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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92048271
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 1,698,407
Date of Issue: June 30, 1992

RHINO LININGS USA, INC.,)	
Petitioner,)	
)	
vs.)	Cancellation No. 92048271
)	
RAPID RACK INDUSTRIES, INC.,)	
Applicant.)	
)	

**PETITIONER'S BRIEF IN SUPPORT OF PETITIONER'S
SECOND MOTION FOR SANCTIONS**

Petitioner Rhino Linings USA, Inc. ("Petitioner"), by and through the undersigned counsel, respectfully submits this Brief in Support of its Second Motion for Sanctions.

OVERVIEW

The present cancellation proceeding concerns whether Registrant Rapid Rack Industries, Inc. ("Rapid Rack") has abandoned its RHINO RACK Mark of Registration No. 1,698,407 (the "Mark" or the "RHINO RACK Mark") and whether Rapid Rack committed fraud on the Trademark Office in a Declaration of Use filed on April 9, 2002. Petitioner has diligently pursued discovery in an attempt to see if Rapid Rack can produce information tending to rebut the strong evidence of abandonment and fraud. In response to Petitioner's discovery, Rapid Rack has engaged in a consistent pattern of delay, obstruction, and rules violations, and has repeatedly failed to respond to discovery concerning whether, how, and when it has used its Mark and whether it submitted a fraudulent declaration of use.

After Rapid Rack delayed for nearly a year before responding to written discovery requests, Rapid Rack's responses were woefully inadequate, which necessitated Petitioner's filing of the Motion to Compel, Motion to Deem Requests for Admissions Admitted, and Motion for Sanctions (the "First Motion for Sanctions") on September 5, 2008. As the First Motion for Sanctions points out, Rapid Rack has completely failed to respond to discovery concerning on the ultimate issue of fact in this cancellation, namely the abandonment of the RHINO RACK Mark by Rapid Rack.

In an attempt to avoid sanctions for its discovery violations, on September 23, 2008, Rapid Rack filed a federal lawsuit and a motion to stay the present cancellation, despite the fact that this cancellation proceeding has been pending since October 15, 2007 and discovery is nearly complete. Then, on the last day for Rapid Rack to respond to the First Motion for Sanctions—and the day before the 30(b)(6) deposition of Rapid Rack—Rapid Rack filed with this Board a motion for extension of time for it to respond to the First Motion for Sanctions, in which it relied solely upon the eleventh-hour federal lawsuit as the basis for its continued disregard for the discovery process in this case.

The Rule 30(b)(6) deposition of Rapid Rack was noticed back on September 3, 2008, to occur on September 22, 2008, the last day of the discovery period, in hopes that Rapid Rack would make a full response to the Petitioner's written discovery in time for Rapid Rack's deposition. Although the Board suspended proceedings pending its decision on the First Motion for Sanctions, the Board specifically instructed that the time for either party to appear for a discovery deposition which had been duly noticed prior to the filing and service of the the First Motion for Sanctions was *not* suspended. At Rapid Rack's request, Petitioner rescheduled the deposition for September 26, 2008. At no time did Rapid Rack file a motion

for a protective order concerning the deposition, nor did Rapid Rack inform counsel for Petitioner that Rapid Rack had any objections to or issues with the Notice of Deposition or any topics identified therein.

On the day of deposition, September 26, 2008, Rapid Rack produced only one designee to testify on its behalf. After the deposition had already begun, counsel for Rapid Rack informed counsel for Petitioner *for the first time* that Rapid Rack's sole designee would not testify regarding approximately half of the topics set forth in the Notice of Deposition. In so doing, Rapid Rack unilaterally decided to designate a deponent as to only certain topics of its choosing, without providing any advance notice to counsel for Petitioner.

The 22 out of 45 topics for which Rapid Rack indicated that it was *not* designating a deponent related to core issues in the case, such as: (1) the validity of the declaration of use filed by Rapid Rack; (2) the registration and maintenance of the RHINO RACK Mark; (3) the denials contained in Rapid Rack's Answer to the Petition to Cancel; and (4) the substance of Rapid Rack's responses to written discovery and the documents produced by Rapid Rack. Rapid Rack never identified any other designee for these topics, nor identified any other proposed date or time to depose any other designee on those topics (although Rapid Rack spuriously claimed it was not "refusing" to produce another designee on those topics). Counsel for Petitioner repeatedly attempted to convince Rapid Rack to produce any additional designees needed for a full examination on all of the 30(b)(6) notice topics on the day of the deposition, but Rapid Rack flatly refused.

Finally, even as to the 23 out of 45 topics on which Rapid Rack's designee was designated to testify, Rapid Rack had utterly failed to educate its designee as to Rapid Rack's knowledge on those designated topics. The designee repeatedly retreated behind the claim that

he lacked “personal knowledge” of the answers to deposition questions, in an attempt to avoid committing Rapid Rack to any positions at all.

Rapid Rack’s pattern of misconduct shows that Rapid Rack does not intend to follow the Rules of Civil Procedure or of this Board. Rather, it has done—and will continue to do—everything it can to obstruct and delay this process and to prejudice Petitioner’s right to put on its case. On these facts, substantial sanctions must be imposed to preserve the integrity of the Board and the discovery process.¹

STATEMENT OF PERTINENT FACTS

I. Rapid Rack Has Engaged In A Pattern Of Misconduct Since The Beginning Of The Discovery Period.

While this present motion mostly concerns Rapid Rack’s discovery misconduct at the 30(b)(6) deposition, the history of this cancellation proceeding demonstrates that Rapid Rack’s behavior at that deposition is in keeping with its pattern of dilatory conduct and willful refusal to comply with discovery requests:

10/15/07: Petitioner filed the present cancellation action.

11/12/07: Petitioner propounded written discovery requests to Rapid Rack.

6/24/08: Seven months later, Rapid Rack finally served its putative responses.

Rapid Rack’s putative responses were evasive, incomplete, and inadequate in almost every way, and they violated the applicable discovery rules and Rule 11’s good faith requirement.²

¹ Should the Board decide against entry of judgment, then at a minimum, Rapid Rack’s repeated disregard for the rules and for this Board should be met with sanctions (1) ordering that Rapid Rack be precluded from presenting any evidence with respect to those topics set forth in the 30(b)(6) Notice of Deposition of Rapid Rack; (2) prohibiting Rapid Rack from opposing Petitioner’s claims against Rapid Rack for abandonment of a trademark and for fraud on the trademark office; and/or (3) striking Rapid Rack’s Answer (Doc. No. 4), Motion for Stay of Proceedings (Doc. No. 11), and Motion for Extension of Time (Doc. No. 13)

² See Letter from Joseph Dowdy dated July 11, 2008 (the “July 11 letter”) attached as Exhibit 2 to the First Motion for Sanctions, Docs. Nos. 9 and 12.

7/11/08: Counsel for Petitioner sent a letter to counsel for Rapid Rack detailing the numerous deficiencies in Rapid Rack's discovery responses and requested a written response by July 16, 2008 and a Rule 30(b)(6) deposition of Rapid Rack.³

7/11 - 7/27/08: Petitioner received no substantive response to its July 11 letter.⁴

7/28/08: Counsel for Petitioner had only two very brief telephone calls with counsel for Rapid Rack, due to the unavailability of counsel for Rapid Rack. Counsel for Rapid Rack requested a letter clarifying certain items and indicated that Rapid Rack would provide a written response to the July 11 letter.⁵

8/12/08: Counsel for Petitioner sent a letter providing the clarifications requested during the July 28, 2008 telephone conversation and reiterated Rhino Lining's request for a substantive written response to its July 11 letter.⁶

8/14/08: An administrative assistant to counsel for Rapid Rack sent a one-page letter advising of the continued unavailability of counsel for Rapid Rack through August 22, 2008. This letter did not address the vast majority of the pending discovery issues raised in the July 11, 2008 letter.⁷

8/14 - 9/03/08: Rapid Rack did not provide appropriate supplemental responses or any substantive written response to the July 11 letter. The undersigned counsel heard nothing further from Rapid Rack with respect to their concerns that Rapid Rack's discovery responses were deficient, with the exception of two non-substantive after-hours voicemails left for David

³ See *id.*

⁴ See Letter from Joseph Dowdy dated August 12, 2008, attached as Exhibit 3 to the First Motion for Sanctions (Docs. Nos. 9, 12).

⁵ See *id.*

⁶ See *id.*

⁷ See Letter from Roxanne Gaines, attached as Exhibit 5 to the First Motion for Sanctions (Doc No. 9).

Harlow (each of which merely noted a call and stated that another call would be attempted later).⁸

9/3/08: After waiting almost two months (during which Petitioner received no substantive response from Rapid Rack concerning the July 11 letter, and received no cooperation in scheduling the Rule 30(b)(6) deposition of Rapid Rack), counsel for Petitioner sent a letter to counsel for Rapid Rack, explaining that Petitioner would be filing a motion to compel.⁹ Under cover of the September 3 letter, the undersigned counsel also served a Notice of Deposition for the Rule 30(b)(6) Deposition of Rapid Rack to take place on September 22, 2008 (the last day of the discovery period).¹⁰

9/5/08: Petitioner filed its First Motion for Sanctions.

9/15/08: The Board entered an order suspending proceedings pending determination of the First Motion for Sanctions. In its Order, the Board stated, "This suspension order does **not** toll the time for either party to make any required disclosure, to respond to discovery requests which had been duly served prior to the filing and service of the motion to compel, or to appear for a discovery deposition which had been duly noticed prior to the filing and service of the motion to compel" (emphasis in original).¹¹

9/17 – 9/22/08: Counsel for Rapid Rack, Patrick Ormé, requested a postponement of Rapid Rack's deposition, based on representations that he was unavailable to defend the deposition because he was sick and that his partner, David Dillard, had a trial-related

⁸ See Letter from Joseph Dowdy dated September 3, 2008, attached as Exhibit 4 to the First Motion for Sanctions, Docs. Nos. 9, 12.

⁹ See *id.*

¹⁰ See Notice of Rule 30(b)(6) Deposition of Rapid Rack, attached as Exhibit 1 hereto.

¹¹ See September 15, 2008 Order, Doc. No. 10.

conflict.¹² In a follow-up telephone call, Mr. Ormé suggested that the deposition go forward on *one* of the following dates: September 24, September 25, or September 26, 2008. Petitioner's counsel agreed to reschedule the deposition for September 26 per Mr. Ormé's request.¹³ Despite numerous opportunities to do so, Mr. Ormé and Mr. Dillard never indicated that Rapid Rack had concerns that the Rule 30(b)(6) deposition would take longer than one day and never indicated that Rapid Rack would refuse to produce designee(s) on the day of deposition prepared to testify on approximately half of the topics set forth in the Notice of Deposition. Having no reason to suspect that Rapid Rack would seek unilaterally to limit its deposition examination, the Petitioner's counsel devoted numerous hours in good faith to preparing to take the Rule 30(b)(6) deposition of Rapid Rack on all topics set forth in the Notice of Deposition, obtained exhibits for the deposition (many of which were in color), and obtained the services of a court reporter,¹⁴ which efforts resulted in *well over \$6,000* in costs and expenses for Petitioner.¹⁵

9/23/2008: Rapid Rack filed a complaint in the Central District of California, parroting as a declaratory judgment claim the same issues that are already present in this cancellation. Essentially, Rapid Rack seeks a "do-over" of the present litigation to avoid having to live with the consequences of its numerous discovery failures.¹⁶

9/24/2008: Rapid Rack then filed with this Board a Motion to Suspend the cancellation proceeding, contending that its last-minute federal filing (which was not yet served) should result in a suspension of the present proceeding (which has been pending for

¹² See email correspondence between Joseph Dowdy and Patrick Orme, attached as Exhibit 2 hereto.

¹³ See *id.*

¹⁴ See Letter of Joseph Dowdy dated September 24, 2008 and FedEx proof of delivery for deposition exhibits, attached as Exhibit 3 hereto.

¹⁵ Although these costs and expenses cannot be taxed against Rapid Rack as a discovery sanction, see TBMP § 411.04, they are relevant to show how Petitioner has been prejudiced by Rapid Rack's misconduct.

¹⁶ See attachment to Rapid Rack's Motion to Suspend, Doc. No. 11.

almost a year, is nearing the close of discovery, and is very likely to end in the cancellation of Rapid Rack's Mark).¹⁷

9/25/08: September 25 was the deadline for Rapid Rack to file its response to Petitioner's First Motion to Sanctions. Rather than filing a response attempting to explain its discovery failures, Rapid Rack filed a motion for an extension of time to respond, which set forth no good cause why the response time should be extended.¹⁸ However, during a telephone call on the same date, Mr. Dillard stated, "absent an order from the Board, we [Rapid Rack's counsel] are assuming that the deposition will go forward."

9/26/08: The day of the deposition arrived without Rapid Rack filing a motion for a protective order or a motion to limit examination. For the first time ever, after the deposition had started, counsel for Rapid Rack informed the undersigned counsel that Rapid Rack was producing only one witness during the deposition and that he was only being designated to testify for Rapid Rack for approximately half of the topics set forth in the Rule 30(b)(6) Notice of Deposition.

II. Rapid Rack Failed To Comply With Rule 30(b)(6) Of The Federal Rules Of Civil Procedure, Which Required That Rapid Rack Designate One Or More Persons Prepared To Appear And Testify With Respect To All Topics Set Forth In The Rule 30(b)(6) Deposition Notice.

The Rule 30(b)(6) deposition of Rapid Rack Industries took place on September 26, 2008 by telephone, starting at approximately 8:45 a.m. PDT. Rapid Rack's counsel, Patrick Ormé, presented only one witness for the deposition: Randy Taylor, the Director of Operations for Rapid Rack Industries. However, about ten minutes after the start of the deposition, Mr. Ormé stated that Mr. Taylor was only being designated to speak on behalf of Rapid Rack for

¹⁷ See Rapid Rack's Motion to Suspend, Doc. No. 11

¹⁸ See Rapid Rack's Motion for Extension of Time, Doc. No. 13.

approximately half of the topics identified in the Notice of Deposition.¹⁹ There was then an extended discussion between counsel in which the Petitioner's counsel repeatedly asked why Rapid Rack had not designated anyone else to testify concerning the remaining topics and repeatedly warned Mr. Ormé of the consequences of the same.²⁰ Mr. Ormé had no valid explanation for his client's failure to produce one or more designees with respect to the remaining topics, did not identify any such additional designees or offer any other dates for continuing deposition of such other designees, and repeatedly failed to offer to produce any additional witnesses on the day upon which the deposition had been scheduled.²¹

Petitioner continued with the deposition, asking Mr. Taylor to confirm which topics he would be prepared to address in the deposition. Mr. Taylor candidly testified that he had not been prepared to testify on behalf of the company for a number of the noticed topics. He further explained that, as to the noticed topics for which he would be testifying, he had first heard about the deposition the day before, had not seen the 30(b)(6) Notice of Deposition until the day of the deposition (which deposition commenced at 8:45 a.m.), and that he had spent a total of "maybe an hour" preparing for the deposition by looking at some computer screenshots of one product sold by Rapid Rack.²²

On substantive issues, Mr. Taylor testified that he only had knowledge of the RHINO RACK Mark being used in 2007 and 2008, and then only in connection with two products sold by Rapid Rack, namely item nos. GRL 100 and GRL 3012.²³ He thought that the Mark *possibly* may have been used on item no. RR4805 between 1998 and 2003, but had no

¹⁹ See Rough Transcript of the Rule 30(b)(6) Deposition of Rapid Rack (redacted with respect to confidentiality designations), attached as Exhibit 4 hereto, at pp. 7:7 - 8:2

²⁰ *Id.* at pp. 7:7 - 20:7

²¹ *Id.*

²² *Id.* at pp. 6:18 - 7:2; 20:9 - 23:1.

²³ *Id.* at pp. 40:18-25; 58:17 - 59:4; 74:14 - 75:23.

knowledge of any use of the Mark for 2004, 2005, and 2006.²⁴ With respect to RR4805, he testified that the only basis for his belief that RR4805 used the RHINO RACK Mark between 1998 and 2003 was his review of certain screenshots from the company's computer sales system.²⁵ These screenshots were presented as exhibits during the deposition, but only show that an item no. RR4805 was sold in certain quantities between 1998 and 2003 and that it was designated in the computer system as "RINO RACK."²⁶ Mr. Taylor testified that between 1998 and 2008 he did not know whether RR4805 actually bore the RHINO RACK Mark, and he was unsure whether RR4805 bore a "RINO RACK" tagline instead of the RHINO RACK Mark.²⁷ Indeed, according to Mr. Taylor, his belief that RR4805 used the RHINO RACK Mark was based solely on the existence of the "RR" designator and the "RINO RACK" label on the computer screenshot.²⁸ Stated simply, Mr. Taylor testified that he was completely unaware of any non-speculative evidence of actual use of the RHINO RACK Mark in commerce by Rapid Rack for any time period prior to 2007.²⁹ This was despite the fact that he and counsel for Rapid Rack stated that he was being tendered to testify regarding the following topics in the Notice of Deposition:

6. [Rapid Rack]'s use of [the] Mark from January 1, 1998 to present[;]

7. [Rapid Rack]'s use of [the] Mark in commerce from January 1, 1998 to present[; and]

9. The products in connection with which [Rapid Rack] uses or has used [the] Mark in commerce from January 1, 1998 to present.

²⁴ *Id.* at pp. 36:14 – 40:17; 55:1 – 55:16; 76:20 – 84:14.

²⁵ *Id.*

²⁶ *Id.* at pp. 76:20 – 84:14; Dep. Exh. 7.

²⁷ *Id.* at pp. 36:14 – 40:17; 41:4 – 41:20; 55:1-16; 78:12-79:20; Dep. Exh. 7.

²⁸ *Id.* at pp. 36:14 – 40:17; 41:4 – 41:20; 78:12-79:20; Dep. Exh. 7.

²⁹ *Id.* at pp. 36:14 – 40:17; 76:20 – 84:14

Mr. Taylor further testified that he had no knowledge of whether the Designation of Use filed by Rapid Rack in 2002 was truthful or not.³⁰ He testified that he had no knowledge of any information that would have formed the basis of the Designation of Use.³¹ He also admitted lack of knowledge regarding use of the Mark in commerce, lack of knowledge regarding the selection of the Mark and protection of the Mark, and lack of knowledge about any specimens of use demonstrating use of the RHINO RACK Mark.³² Mr. Taylor further testified that, he was unaware of Rapid Rack advertising its products anywhere other than on Internet websites, and he was not aware of whether the websites owned by Rapid Rack contained the RHINO RACK Mark.³³ This was despite the fact that he and counsel for Rapid Rack stated that he was being tendered to testify regarding the following topics listed in the Notice of Deposition:

8. Whether [Rapid Rack] possesses a specimen of use which demonstrates use of [the M]ark in commerce in each calendar year from 1998 to present[; and]

17. [Rapid Rack]'s use of [the] Mark in advertising, including any such use in periodicals, journals, radio and/or television advertisements, and Internet websites from January 1, 1998 to the present.

Given that Rapid Rack failed to produce a witness prepared to testify with respect to the core issues in the case, the deposition ended after approximately three hours of examination. Rapid Rack made no effort to produce one or more designees to testify with respect to the remaining topics listed in the Rule 30(b)(6) Notice of Deposition. Thus, Rapid Rack's Rule 30(b)(6) deposition was marred by the same intentional effort to obstruct discovery that

³⁰ *Id.* at pp. 34:9 – 36:12.

³¹ *Id.* at pp. 34:9 – 36:12.

³² *Id.* at pp. 36:14 – 40:17; 41:4 – 41:20; 76:20 – 84:14.

³³ *Id.* at pp. 27:14 – 28:12; 62:24-64:8.

appears to have been Rapid Rack's litigation strategy from the inception of this cancellation proceeding.

III. Rapid Rack's Recent Filings With The Board Demonstrate That It Does Not Intend To Comply With Its Discovery Obligations And Contain Mischaracterizations of Law.

Instead of preparing for its Rule 30(b)(6) deposition or responding to the First Motion For Sanctions, Rapid Rack spent the week of September 22, 2008 implementing a scheme which it hoped would prevent the Board from acting on its refusals to provide discovery in this cancellation proceeding. Specifically, on September 23, Rapid Rack filed a complaint in the Central District of California parroting as a declaratory judgment claim the same issues that are already present in this prior pending cancellation proceeding. The complaint filed by Rapid Rack essentially seeks a "do over" of the present cancellation proceeding, which is nearing the close of discovery and is very likely to end in the cancellation of Rapid Rack's Mark.

The next day, September 24, Rapid Rack filed a motion to suspend the present cancellation, based solely on the "do-over" strategy that motivated Rapid Rack to file its September 23 complaint.³⁴ Finally, on September 25, Rapid Rack filed a groundless motion for extension of time to respond to the Petitioner's Motion to Compel which does not even attempt to make a showing of good cause for Rapid Rack's failure to respond within the time provided by the TBMP.³⁵ Instead, Rapid Rack again asserted that its eleventh-hour federal filing should constitute a "get of jail free card" with respect to all TTAB proceedings.

In its motion for extension of time, Rapid Rack includes a footnote in which it states the following: "Rapid Rack's current response to the Amended Motion to Compel tolls from the time of filing the Amended Motion and therefore a response is not due until October 7, 2008

³⁴ See Rapid Rack's Motion to Suspend, Doc. No. 11.

³⁵ See Rapid Rack's Motion for Extension of Time, Doc. No. 13.

under 37 C.F.R. §§ 2.119(e), 2.127(a).” Based on the instructions of the Interlocutory Attorney, the Amended Motion to Compel was filed in response to certain objections by Rapid Rack’s counsel and is identical to the original Motion to Compel, with the exception of the redaction of certain allegedly confidential information and a notation stating the reason it was filed.³⁶ Therefore, the filing of the Amended Motion had no impact on Rapid Rack’s response date. Further, the two referenced provisions of the Code of Federal Regulations do not even remotely stand for the proposition for which they have been cited. Thus, as of the date of this filing, Rapid Rack not only has delayed in responding to discovery, but it also has failed to timely respond to the First Motion for Sanctions.

LEGAL ARGUMENT

I. RAPID RACK’S PATTERN OF MISCONDUCT LEADING UP TO ITS DEPOSITION, STANDING ALONE, SHOULD RESULT IN SANCTIONS.

Under Rule 37 of the Federal Rules of Civil Procedure, sanctions are appropriate for the failure to provide or permit discovery in accordance with a scheduling order, particularly where as here: (a) the misconduct has been frequent in occurrence and egregious in nature, and (b) the failure to respond to discovery is on the ultimate issue of fact, namely the abandonment of the Mark by Rapid Rack. *See* Fed. R. Civ. P. 37(b)(2)(A) (stating that the tribunal should consider what is “just”). Rapid Rack has a history in this litigation of violating several provisions of the discovery rules, including the provisions requiring appropriate responses to requests for admissions, interrogatories, and requests for production of documents. *See* Fed R. Civ. P. 36(a)(4), (6); 37(a)(3)(B); TBMP §§ 411.01, 411.02 and 527.01(d).

In its most recent filings with the Board, Rapid Rack has taken the position that it should be allowed to indefinitely delay its response on the issue of whether it has prejudicially

³⁶ *See* Correspondence concerning confidentiality designations, attached as Exhibit 5 hereto.

delayed and obstructed discovery. The merits of Rapid Rack's filings are addressed more fully in Petitioner's Response in Opposition to Rapid Rack's Motion to Suspend and Motion for an Extension of Time. For purposes of the present Second Motion for Sanctions, Petitioner notes only that these filings demonstrate Rapid Rack's bad faith intent to delay and obstruct the present cancellation.

II. RAPID RACK'S LATEST TRANSGRESSION—THE KNOWING AND INTENTIONAL REFUSAL TO APPEAR AND TESTIFY WITH RESPECT TO NUMEROUS TOPICS SET FORTH IN A RULE 30(B)(6) DEPOSITION NOTICE—FURTHER WARRANTS SANCTIONS.

Rules 37(d)(1)(A)(i) and (d)(3) mandate that a party must attend its own deposition unless it has obtained a protective order excusing it from compliance. Rapid Rack unjustifiably failed to comply with these rules.

A. Rule 30 Is Unambiguous Concerning The Procedures That Rapid Rack Had To Follow (And Failed To Follow) With Respect To Its Corporate Deposition.

At the deposition, Mr. Ormé stated that Rapid Rack felt that it was justified in unilaterally deciding to withhold deponents for certain topics because (1) Rapid Rack did not know how long the deposition was going to take, and (2) Rapid Rack felt that the examination of the designee whom it had produced would take "most of the day." The stated bases for Rapid Rack's deposition-related failures do not withstand even a cursory reading of Rule 30.

Mr. Ormé first contended that multiple deponents need not attend the deposition, even though multiple deponents were required to complete the deposition. This absurd contention is belied by the plain language of Rule 30(b)(6), which provides as follows:

In its notice . . . , a party may name as the deponent . . . [an] entity and must describe with reasonable particularity the matters for examination. The **named organization must then designate one or more** officers, directors, or managing agents, or designate other **persons who consent to testify on its behalf**; and it may

set out the matters on which each person designated will testify. . . . **The persons designated must testify** about information known or reasonably available to the organization. (emphasis added)

The Notice of Deposition set forth with reasonable particularity forty-five topics upon which examination was requested of Rapid Rack and stated that it was the obligation of Rapid Rack to designate one or more persons to testify with respect to those topics. Although examination was requested on forty-five topics to ensure that the “reasonable particularity” requirement of Rule 30(b)(6) had been satisfied, each of these topics related to the handful of core issues involved in the case.

Mr. Ormé further contended that Rapid Rack need not produce all of its designees on the same day (namely, the day upon which the deposition had been scheduled) because the undersigned counsel had not told him how long the deposition would take. This contention is also meritless, because the duration of depositions are governed by Rule 30(d).

Rule 30(d)(1) provides that, “[u]nless otherwise stipulated or ordered by the court, a **deposition is limited to 1 day of 7 hours.**” Petitioner never stated, and never anticipated, that it needed more than one seven-hour day to take the deposition of Rapid Rack, and did not seek to schedule more than one day for the taking of the deposition. Neither did Rapid Rack: In the numerous communications among counsel leading up to the deposition, Rapid Rack’s counsel did not express any concern that more than one seven-hour day would be needed, and Rapid Rack did not file a motion for a protective order or a motion to terminate or limit the deposition. Accordingly, Rapid Rack was under an obligation to bring *all* of its Rule 30(b)(6) designees to the deposition *on the date it was scheduled to take place*. Rapid Rack failed to

comply with this straightforward requirement and had no legitimate explanation or reason for its failure.

B. Rapid Rack's Conduct In Producing A Deponent For Only Half Of The Topics Set Forth In The Notice Of Deposition—And A Deponent Who Spent Very Little Time Preparing For The Deposition—Violated Its Obligations Under Rule 30(b)(6).

Rule 30(b)(6) imposes four distinct duties upon a corporation subject to deposition:

First, the responding entity must designate a deponent who is knowledgeable on the subject matter identified as the area of inquiry **Second**, the responding entity must designate more than one deponent if multiple deponents are necessary to respond to all of the relevant areas of inquiry **Third**, the responding entity must prepare the deponent so that he or she can testify on matters not only within his or her personal knowledge, but also on matters reasonably known by the responding entity **Fourth**, if it becomes apparent during the deposition that the designated deponent is unable to respond to the relevant areas of inquiry, then the responding entity has the duty to substitute the designated deponent with a knowledgeable deponent.

U.S. ex rel Fago v. M & T Mort. Corp., 235 F.R.D. 11, 22–23 (D.D.C. 2006) (emphasis added). Rapid Rack has violated all four duties imposed by Rule 30(b)(6).

The first and second duties imposed by the Rule required Rapid Rack to designate deponents knowledgeable on the subject matter identified and to produce the number of deponents necessary to respond to all of the relevant areas of inquiry. Rapid Rack plainly did not do so. Of the forty five topics set forth in the deposition notice, Rapid Rack refused to designate *anyone* prepared to testify for topics nos. 3, 4, 5, 11, 12, 13, 14, 15, 30, 31, 32, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, and 45.³⁷ Further, even with respect to the topics for which the deponent had been designated, Mr. Ormé made numerous speaking objections, repeatedly claiming that questions were beyond the scope of the deponent's designation or

³⁷ Rapid Rack Dep., at pp. 7:3 – 23:1

called for speculation.³⁸ Thus, Rapid Rack failed to satisfy either of its first two duties under the Rule. *See, e.g., Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995) (“Citibank seems to believe that it can satisfy Rule 30(b)(6) by producing a witness with only selected information to offer. . . . The Federal Rules and this Court do not countenance self-selecting discovery by either party.”).

The third duty required Rapid Rack to prepare the deponent so that he could testify on matters not only within his or her personal knowledge, but also on matters reasonably known to Rapid Rack. However, the deponent candidly acknowledged that his employer, Rapid Rack, had expended “very little” effort to prepare him for his deposition.³⁹ Indeed, he testified that he was not even aware of the deposition until the late afternoon of the day immediately preceding the deposition and that he did not see the Notice of Deposition and list of topics until the day of deposition, which started at approximately 8:45 a.m. PDT. As a result of the failure of preparation, the deponent repeatedly claimed lack of “personal knowledge” about questions directed to Rapid Rack. Rapid Rack was required to take the preparation of its deponent more seriously. *See, e.g., Protective Nat’l Ins. v. Commonwealth Ins.*, 137 F.R.D. 267, 277-78 (D. Neb. 1989) (holding that a company must prepare its Rule 30(b)(6) designee to testify regarding the knowledge of the corporation).

The fourth duty required Rapid Rack to immediately substitute a deponent once it became obvious that the designated deponent would be unable to respond to all relevant areas

³⁸ Indeed, Mr. Ormé objected that questions were beyond the scope of the deponent’s designation or called for speculation approximately 51 times. *See id.*, at pp.30:9-12; 30:21-25; 31:2-5; 31:13-19; 31:22 – 32:6; 32:8-10; 32:12-14; 32:16-18; 32:25 – 33:2; 33:4-6; 35:7-10; 35:14-17; 36:2-6; 42:23 – 43:3; 43:5-7; 43:13-17; 43:20-24; 43:2-4; 46:21-25; 47:11-16; 51:23 – 52:3; 53:15-17; 54:14-17; 54:23-25; 61:20-23; 63:8-10; 64:21-23; 65:1-3; 65:6-12; 65:15-20; 65:22-25; 66:2-7; 70:17-24; 73:22-74:4; 74:6-11; 74:22-25; 75:7-9; 75:11-14; 75:16-18; 76:4-8; 76:9-11; 76:13-15; 77:7-13; 80:7-12; 81:5-8; 82:10-13; 82:22 – 83:1; 83:3-4; 83:11-14; 83:18-22; 83:24 – 84:2; 84:6-9. Counsel’s speaking objections and coaching of the witness violated Rule 30(c)(2)’s mandate that “[a]n objection must be stated in a nonargumentative and nonsuggestive manner.”

³⁹ *Id.*, at pp. 22:8 – 23:1.

of inquiry. Rapid Rack failed with respect to this duty by producing only an empty chair with respect to half of the topics designated. Rapid Rack compounded this by failing to produce another deponent during the course of the deposition once it became clear that examination would not be limited to the topics for which Rapid Rack had produced a designee and when it became clear that the deponent was woefully unprepared to answer basic questions regarding use of the Rapid Rack's Mark. *See, e.g., Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (holding that, even where defendant in good faith thought deponent would satisfy the deposition notice, it had a duty to substitute another person once the deficiency of its designation became apparent during the course of the deposition, and to act immediately where defendant was in a better position to take care of exigencies). As with its other duties, Rapid Rack wholly failed in this regard.

The "underlying purposes" of Rule 30(b)(6) are "**preventing serial depositions of various witnesses without knowledge** within an organization" and preventing numerous designees from "disclaim[ing] knowledge of facts that are clearly known to persons in the organization and thereby to the organization itself." *Alexander v. F.B.I.*, 186 F.R.D. 137, 141 (D.D.C. 1998) (emphasis added). Rapid Rack's refusal to cooperate and comply with its obligations in the Rule 30(b)(6) deposition violates the letter of the Rule and, if allowed, would result in the type of serial depositions that the rule seeks to prevent.

B. As A Matter Of Law, Rapid Rack Willfully Refused To Appear And Testify At Its Rule 30(b)(6) Deposition And The Law is Unequivocal That It Should Be Sanctioned For This Misconduct.

Generally, the failure to produce one or more designees prepared to testify regarding the company's knowledge on topics listed in a Rule 30(b)(6) deposition notice constitutes the

willful failure to appear and testify at a deposition in violation of Rule 37(d)(1)(A)(i) and should result in sanctions:

When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.

Resolution Trust Corp. v. Southern Union Co., Inc., 985 F.2d 196, 197 (5th Cir. 1993); *see also Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126, 128 (D. Md. 2002) (sanctioning a corporation for its failure to provide a knowledgeable and prepared corporate representative, reopening discovery for the limited purpose of a deposition for which the corporation was ordered to produce fully prepared and capable designees, at its expense, including the fees and travel expenses of two opposing counsel, and ordering the corporation to pay costs to compensate the time and expense associated with preparing the motion for sanctions). A finding of willful failure to appear and testify is especially appropriate here, because Rapid Rack failed to produce a designee with respect to all topics in the Notice of Deposition, failed to produce a designee who was prepared to testify with respect to the other topics in the deposition, and failed to produce one or more witnesses who were prepared to testify concerning the core issue in this cancellation—the abandonment of the RHINO RACK Mark by Rapid Rack.

Rule 37 specifically provides for sanctions when a party willfully refuses to attend a discovery deposition, as Rapid Rack has done in this case:

The court where the action is pending may, on motion, order sanctions if . . . a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition.

Fed. R. Civ. P. 37(d)(1)(a)(i). "Sanctions [for the failure to appear] may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P. 37(d)(3). Specifically, they may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part; [or]

(vi) **rendering a default judgment against the disobedient party**

Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi) (emphasis added). Consistent with the Federal Rules of Civil Procedure, the TBMP provides as follows:

In *inter partes* proceedings before the Board, a variety of sanctions may be imposed, in appropriate cases, for failure to provide discovery. The sanctions which may be entered by the Board include, *inter alia*, striking all or part of the pleadings of the disobedient party; refusing to allow the disobedient party to support or oppose designated claims or defenses; drawing adverse inferences against uncooperative party; prohibiting the disobedient party from introducing designated matters in evidence; and **entering judgment against the disobedient party.**

TBMP § 411.04 (emphasis added).

On the facts of this case, it is incontrovertible that Rapid Rack has exposed itself to sanctions. The only issue for the Board is the nature of the sanctions which it needs to impose

to punish Rapid Rack for repeatedly treating the discovery process and the Board with contempt.

III. JUDGMENT IS THE APPROPRIATE SANCTION, GIVEN RAPID RACK'S HISTORY OF DELAY, OBSTRUCTION, AND OBFUSCATION IN THIS CASE.

“If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, the court on motion or notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.” *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir. Tex. 1970) (citing Rule 37). Indeed, this Board has broad discretion to impose such a sanction where, as here, it is necessary to punish the willful misconduct of Rapid Rack and to deter future misconduct by others. *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (“[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”).

Some courts use a multi-factor test to determine whether default is an appropriate sanction. *See, e.g., Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990); *Immuno Vital, Inc. v. Telemundo Group, Inc.*, 203 F.R.D. 561, 571 (S.D. Fla. 2001) (citing *Malautea v. Suzuki Motor Company, LTD.*, 987 F.2d 1536, 1542 (11th Cir. 1993); *Bankatlantic v. Blythe Eastman Paine Webber*, 12 F.3d 1045, 1048-50 (11th Cir. 1994); and *R.M. Phillips v. Insurance Company of North America*, 633 F.2d 1165 (5th Cir. 1981)). One such test, developed by the Ninth Circuit, requires examination of the following factors:

(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Wanderer, 910 F.2d at 656. “The first two of these factors favor the imposition of sanctions in most cases, while the fourth cuts against a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser sanctions.” *Id.* In the present case, the application of this test counsels strongly in favor of judgment as a sanction.

The first two factors—the public’s interest in expeditious resolution of litigation and the Board’s need to manage its dockets—support judgment as a sanction in this case. Rapid Rack currently has a registered trademark for which it can produce no non-speculative evidence of use from 1998 through 2006, and this Mark is acting as a bar to the registration of Petitioner’s marks. Rapid Rack’s dilatory litigation tactics should not be permitted to delay the present litigation or to further delay the work of the Trademark Office.

The third factor—the risk of prejudice to Petitioner—also supports dismissal. As of the date of this filing, Petitioner has been delayed for almost a year in finding out whether Rapid Rack has any proof to rebut what appears to be clear abandonment of the RHINO RACK Mark. Petitioner has expended thousands of dollars having its counsel try to obtain such discovery, which efforts have been met with dilatory and obstructionist tactics (even *after* Petitioner filed its First Motion for Sanctions). Moreover, the discovery period is near its end, and another extension (in addition to the previous extensions already allowed in this cancellation) would have the effect of punishing Petitioner. *See Goforth v. Owens, M.D.*, 766 F.2d 1533, 1535 (11th Cir.1985) (finding continuance was not appropriate to cure prejudice because it would have punished the non-offending party).

Although the fourth factor—the public policy favoring disposition of cases on their merits—generally cuts against judgment as a sanction, this is not the case under the present circumstances. Because Rapid Rack has failed to produce evidence that it has not abandoned its RHINO RACK Mark in commerce, Rapid Rack cannot legitimately contend that it would survive a motion for summary judgment or trial of the issues in this case.⁴⁰

Finally, the fifth factor—the unavailability of appropriate, less drastic sanctions—also counsels in favor of judgment as a sanction. Rapid Rack has repeatedly demonstrated that it does not take seriously a cancellation proceeding concerning its abandonment of a trademark and its fraud on the Trademark Office. Rapid Rack apparently does not feel that it must properly respond to Interrogatories, or admit accurate Requests for Admissions, or provide full and accurate responses to Requests for Production of Documents. Rapid Rack does not feel that it must respond to motions in accordance with the rules governing proceedings before the Board. Even under threat of the First Motion for Sanctions, apparently Rapid Rack does not feel that it needs to tender fully prepared witnesses for deposition, notwithstanding that the Board instructed such deposition to go forward in the Board's order of September 15, 2008.

⁴⁰Consistent with well-established law, the Board should rule that Rapid Rack's Rule 30(b)(6) witness testified as a representative of Rapid Rack, such that his answers bind Rapid Rack with respect to all further proceedings in this cancellation—including summary judgment and trial. See *Marriott v. County of Montgomery*, 426 F. Supp. 2d 1, 9 (N.D.N.Y. 2006) (“A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity and he is responsible for providing all the relevant information known or reasonably available to the entity.”) (quoting *Sabre v. First Dominion Capital, LLC*, 2001 U.S. Dist. LEXIS 20637, No. 01CIV2145BSJHBP, 2001 WL 1590544, at *1 (S.D.N.Y. Dec. 12, 2001) and citing *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 268 (2d Cir. 1999)); *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996) (“[I]f a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change. Otherwise, it is the attorney who is giving evidence, not the party.”) (citation omitted); *Ierardi v. Lorillard, Inc.*, Civ. A. No. 90-7049, 1991 WL 158911, *2 (E.D. Pa. Aug. 13, 1991) (holding that a party cannot introduce evidence during trial contradicting previous statements by Rule 30(b)(6) designee). Such a ruling is also proper under TBMP § 527.01(e), which provides: “A party that responds to a request for discovery by indicating that it does not have the information sought, or by stating objections thereto, may be barred by its own action from later introducing the information sought in the request as part of its evidence on the case”

On these facts, judgment is the only available sanction that will appropriately address Rapid Rack's pattern of misconduct.

CONCLUSION

"[O]verleniency is to be avoided where it results in inadequate protection of discovery." *In re Liquid Carbonic Truck Drivers Chemical Poisoning Litigation*, 580 F.2d 819, 823 (5th Cir. 1978). "[R]epeated dilatory tactics . . . in addition to . . . discovery violations" should result in dismissal where they have "seriously impacted [Petitioner's] ability to prepare effectively for trial." *Inmuno Vital, Inc.*, 203 F.R.D. at 573. That is certainly the case with respect to Rapid Rack's misconduct in the present cancellation. At some point, a litigant's improprieties become an affront to the purpose for which the Board sits. In this cancellation proceeding, which involves claims of abandonment of a registered mark and fraud on the Trademark Office, there has not been a single discovery procedure with which Rapid Rack has been willing to fully comply. Nearly a year into this cancellation, Rapid still has not come forward—in discovery or otherwise—with any evidence that actually shows use of mark during the relevant time period. Rapid Rack's constant stonewalling is telling, as it would naturally be expected to have produced evidence of use if it had any. Rapid Rack's failure to respond to discovery is no minor omission. It is an attempt to evade the ultimate issue of fact, namely, Rapid Rack's abandonment of the RHINO RACK Mark. In the face of its failure to participate in discovery on this core issue, severe sanctions are warranted, and judgment in favor of Petitioner is the appropriate sanction.

Respectfully submitted, this 6th day of October, 2008.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: /Joseph S. Dowdy/

David A. Harlow

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CERTIFICATE OF SERVICE

I hereby certify that on this day a true and correct copy of the foregoing document has been served this day by depositing a true copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first class postage prepaid envelope and properly addressed as follows:

David A. Dillard, Esq.
Patrick J. Ormé, Esq.
Christie, Parker and Hale, LLP
350 W. Colorado Blvd., Suite 500
Pasadena, CA 91105-1836

This, the 6th day of October, 2008.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: /Joseph S. Dowdy/
David A. Harlow
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EXHIBIT 1

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 1,698,407
Date of Issue: June 30, 1992

RHINO LININGS USA, INC.,)	
Petitioner,)	
)	
vs.)	Cancellation No. 92048271
)	
RAPID RACK INDUSTRIES, INC.,)	
Registrant.)	
)	

**NOTICE OF DEPOSITION OF RAPID RACK INDUSTRIES, INC.
(RULE 30(b)(6) DEPOSITION)**

PLEASE TAKE NOTICE that commencing at 8:30 a.m. PDT on September 22, 2008, at the law offices of Christie, Parker & Hale, LLP, 350 W. Colorado Blvd. Suite 500, Pasadena, CA 91105-1836, Rhino Linings USA, Inc. ("Rhino Linings" or "Petitioner"), by and through counsel, will take the deposition of Rapid Rack Industries, Inc. ("Rapid Rack" or "Registrant") pursuant to Rule 26, 28, and 30 of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120. In accordance with Rule 30(b)(6) of the Federal Rules of Civil Procedure, Rapid Rack shall designate one or more officers, directors, managing agents, or other persons to testify as to all matters known or reasonably available to Rapid Rack for those matters designated below.

The deposition shall be taken before a Notary Public or some other officer duly authorized by law to administer oaths. The deponent's testimony shall be recorded by audio,

audiovisual, or stenographic means. Counsel for Rhino Linings shall conduct the deposition via telephone.

If for any reason this deposition is not completed on the date set forth above, the deposition shall be continued from day to day and from time to time until completed. Plaintiff reserves the right to use the deposition testimony as evidence at the trial of this action, to the extent allowed by law.

DEFINITIONS

The definitions set forth in Petitioner's First Set of Interrogatories to Registrant are hereby incorporated by reference and shall apply to this Notice of Deposition.

TOPICS UPON WHICH EXAMINATION IS REQUESTED

In accordance with Rule 30(b)(6) of the Federal Rules of Civil Procedure, examination is requested on the following topics:

1. The corporate organization of Registrant.
2. The nature and type of business conducted by Registrant from January 1, 1998 to present.
3. The conception, registration, and maintenance of Registrant's Mark.
4. Registrant's filings with the United States Patent and Trademark Office concerning Registrant's Mark.
5. Registrant's ownership and assignment, if any, of Registrant's Mark.
6. Registrant's use of Registrant's Mark from January 1, 1998 to the present.

7. Registrant's use of Registrant's Mark in commerce from January 1, 1998 to the present.
8. Whether Registrant possesses a specimen of use which demonstrates use of Registrant's Mark in commerce in each calendar year from 1998 to the present.
9. The products in connection with which Registrant uses or has used Registrant's Mark in commerce from January 1, 1998 to the present.
10. The place(s) of manufacturing for the products in connection with which Registrant uses or has used Registrant's Mark in commerce from January 1, 1998 to the present.
11. The specific states of the United States of America and any foreign nations in which Registrant has offered and/or is offering products in commerce using Registrant's Mark in commerce from January 1, 1998 to the present.
12. The channels of distribution in which Registrant has offered products in connection with Registrant's Mark in commerce from January 1, 1998 to the present.
13. The end users of the products offered by Registrant in connection with Registrant's Mark in commerce from January 1, 1998 to the present.
14. Sales revenue received by Registrant from the sale of products offered by Registrant in connection with Registrant's Mark from January 1, 1998 to the present.
15. Registrant's annual advertising, promotion, and marketing expenditures relating to the sale or offering for sale of goods on which Registrant's Mark was used in each year between January 1, 1998 and the present.

16. The manner in which Registrant used Registrant's Mark in connection with any products in commerce, including but not limited to whether Registrant's Mark is used on packaging for the products, whether the products themselves bear Registrant's Mark, and/or whether Registrant's Mark appears on any advertising or other materials in connection with any products from January 1, 1998 to the present.

17. Registrant's use of Registrant's Mark in advertising, including any such use in periodicals, journals, radio and/or television advertisements, and Internet websites from January 1, 1998 to the present.

18. Registrant's use of Registrant's mark in sales, advertising, marketing and promotional materials or items, including without limitation periodical and trade journal advertisements, brochures, leaflets, print or broadcast advertisements, bulletins, points of purchase materials, trade letters, press releases, or other documents or things relating to or displaying Registrant's Mark which were distributed or displayed by or on behalf of Registrant to other persons or used in any way from January 1, 1998 to the present.

19. Any discontinuation(s) of the manufacturing, advertising, production, and/or sale of any product offered in connection with Registrant's Mark at any time from January 1, 1998 to the present, the reasons for any such discontinuation(s), and a detailed description of all non-privileged written or oral communications in which any of Registrant's employees or agents participated or of which any of Registrant's employees or agents are aware concerning any such discontinuation(s).

20. Any discontinuation(s) of the use of Registrant's Mark at any time from January 1, 1998 to the present, the reasons for any such discontinuation(s), and a detailed description of all non-privileged written or oral communications in which any of Registrant's employees or

agents participated or of which any of Registrant's employees or agents are aware concerning any such discontinuation(s).

21. Registrant's use of its GORILLA RACK Mark in connection with the manufacturing, advertising, producing and/or selling of work tables (with or without wheels), work benches, industrial shelving, storage racks, component parts for these items from January 1, 1998 to the present.

22. The specific states of the United States of America and any foreign nations in which Registrant has offered and/or is offering products in connection with its GORILLA RACK Mark.

23. The channels of distribution in which Registrant has offered products in connection with its GORILLA RACK Mark in commerce from January 1, 1998 to the present.

24. The end users of the products offered by Registrant in connection with its GORILLA RACK Mark in commerce from January 1, 1998 to the present.

25. The annual sales revenue received by Registrant from the sale of products offered by Registrant in connection with its GORILLA RACK Mark from January 1, 1998 to the present.

26. Registrant's annual advertising, promotion, and marketing expenditures relating to the sale or offering for sale of goods on which Registrant's GORILLA RACK Mark was used in each year between January 1, 1998 and the present.

27. The manner in which Registrant used its GORILLA RACK Mark in connection with any products in commerce, including but not limited to whether the GORILLA RACK is used on packaging for the products, whether the products themselves bear the GORILLA

RACK Mark, and/or whether the GORILLA RACK Mark appears on any advertising or other materials in connection with any products from January 1, 1998 to the present.

28. Registrant's use of its GORILLA RACK Mark in advertising, including any such use in periodicals, journals, radio and/or television advertisements, and Internet websites from January 1, 1998 to the present.

29. Registrant's use of its GORILLA RACK Mark in sales, advertising, marketing and promotional materials or items, including without limitation periodical and trade journal advertisements, brochures, leaflets, print or broadcast advertisements, bulletins, points of purchase materials, trade letters, press releases, or other documents or things relating to or displaying the GORILLA RACK Mark which were distributed or displayed by or on behalf of Registrant to other persons or used in any way from January 1, 1998 to the present.

30. Litigation concerning Registrant's Mark other than the present cancellation proceeding.

31. Litigation concerning Registrant's GORILLA RACK Mark.

32. The complete factual basis for the assertion in the document styled "Combined Declaration of Use in Commerce and Application for Renewal of Trademark" filed by Registrant on April 9, 2002 that Registrant's Mark was in use by Registrant as of March 26, 2002.

33. The factual information Registrant relied upon in preparing the document styled "Combined Declaration of Use in Commerce and Application for Renewal of Trademark" filed by Registrant with the United States Patent and Trademark Office on April 9, 2002.

34. The misrepresentations, if any, in the document styled "Combined Declaration of Use in Commerce and Application for Renewal of Trademark" filed by Registrant on April 9, 2002, whether Registrant had knowledge of any misrepresentations, and Registrant's intended purpose in making any such misrepresentations.

35. The complete factual basis for all admissions, denials, defenses, and other statements set forth in Registrant's Answer filed in the present cancellation proceeding.

36. Registrant's responses to Interrogatories, Requests for the Production of Documents and Things, and Requests for Admissions propounded by Rhino Linings in the present cancellation proceeding.

37. The documents and things produced by Registrant in response to Requests for the Production of Documents and Things propounded by Rhino Linings in the present cancellation proceeding.

38. Registrant's efforts to investigate whether there was information and/or documents responsive to Interrogatories, Requests for the Production of Documents and Things, and Requests for Admissions propounded by Rhino Linings in the present cancellation proceeding, and the identification of the person(s) employed by Registrant who were responsible for any such investigation(s).

39. Registrant's assertion, in response to any discovery request propounded in the present cancellation proceeding, that "some information relevant to this request may have been destroyed during a flood at Rapid Rack's facilities in 2005" or words of like effect.

40. Registrant's assertion, in response to any discovery request propounded in the present cancellation proceeding, that "much of the requested information is not readily

available due to its location in old, possibly corrupt and no longer readily accessible databases” or words of like effect.

41. The location and condition of any electronic databases which contain, or which Registrant believes may contain, information and/or documents or things responsive to the Interrogatories, Requests for Production of Documents or Things, and/or Requests for Admissions propounded by Rhino Linings to Registrant.

42. The location and condition of any files of documents—electronic or hardcopy—which contain, or which Registrant believes may contain, information and/or documents or things responsive to the Interrogatories, Requests for Production of Documents or Things, and/or Requests for Admissions propounded by Rhino Linings to Registrant.


43. Registrant’s efforts to search for information and/or documents or things—stored in either electronic or hardcopy format—which are, or which Registrant believes may be, information and/or documents or things responsive to the Interrogatories, Requests for Production of Documents or Things, and/or Requests for Admissions propounded by Rhino Linings to Registrant.

44. The complete factual basis for Registrant’s contention, if any, that it possesses or formerly possessed any information and/or documents or things which showed use or use in commerce of Registrant’s Mark, but which have not been provided in response to the Interrogatories, Requests for Production of Documents or Things, and/or Requests for Admissions propounded by Rhino Linings to Registrant.

45. The identify of all employees or agents of Registrant with knowledge concerning any of the foregoing topics set forth in this Notice, and a summary of the knowledge possessed by each such person.

Respectfully submitted this 3rd day of September, 2008.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: 

David A. Harlow
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CERTIFICATE OF SERVICE

I hereby certify that on this day a true and correct copy of the foregoing document has been served this day by electronic mail and by depositing copies thereof in a depository under the exclusive care and custody of the United States Postal Service in a first class postage prepaid envelope and properly addressed as follows:

David A. Dillard, Esq.
Patrick J. Orme, Esq.
Christie, Parker and Hale, LLP
350 W. Colorado Blvd., Suite 500
Pasadena, CA 91105-1836

This the 3rd day of September, 2008.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: Joseph S. Dowdy

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EXHIBIT 2

Joe Dowdy

From: Joe Dowdy
Sent: Friday, September 19, 2008 1:38 PM
To: Patrick J. Orme; David Dillard
Cc: David Harlow; Reed Hollander
Subject: RE: Rule 30(b)(6) Deposition of Rapid Rack--9/22

Dear Patrick:

This will confirm our agreement to reschedule the Rule 30(b)(6) deposition to later during the week of 9/22/2008. You have indicated that you will not object to the deposition being conducted beyond the 9/22 deadline set by the Board in its most recent scheduling order.

From the date range you have provided (9/24 - 9/26), I request Friday, 9/26, at 8:30 a.m., your time, via telephone.

Let's touch base on Monday or Tuesday to iron out any logistics (dial-in numbers, etc.).

I hope you get feeling better soon. Have a good weekend.

Regards,

Joe

[HOME](#) | [VCARD](#) | [BIO](#) | [LOCATION](#)

**Nelson
Mullins**

Joseph S. Dowdy
Attorney at Law
joe.dowdy@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
4140 Parklake Avenue, Raleigh, North Carolina 27612
Tel: 919.329.3867 Fax: 919.877.3799
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From: Patrick J. Orme [mailto:PJO@cph.com]
Sent: Wednesday, September 17, 2008 8:40 PM
To: Joe Dowdy; David Dillard
Cc: David Harlow; Reed Hollander
Subject: RE: Rule 30(b)(6) Deposition of Rapid Rack--9/22

Dear Joe,

We agree with your proposal to conduct the Rule 30(b)(6) deposition telephonically. We would propose an alternate date, however, for several reasons. I am home sick and am not sure when I

10/6/2008

will be back in the office to defend a deposition. From my understanding, you are currently asking the TTAB for an order compelling this deposition. Dave Dillard will also be in a trial starting on Friday that may go into Monday. Also, Rapid Rack's response to Rhino Linings Motion to Compel is due the same day, September 22, 2008.

We are more than willing to discuss an alternate date for this deposition. Dave Dillard will be in the office tomorrow if you care to discuss alternate dates. He can be reached via email or at 626-795-9900.

Regards,

Patrick

EXHIBIT 3

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

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joe.dowdy@nelsonmullins.com

September 24, 2008

Via Federal Express—Next Day Delivery

David A. Dillard, Esq.

Patrick J. Orme, Esq.

Christie Parker Hale LLP

350 W. Colorado Blvd. Suite 500

Pasadena, CA 91105-1836

Re: Deposition Exhibits for Telephonic Rule 30(b)(6) Deposition of Rapid Rack Industries, Inc.

Rhino Linings USA, Inc. v. Patriarch Partners Agency Services, LLC (Rapid Rack Industries, Inc.), Cancellation No. 92048271

Gentlemen:

In the box which accompanies this letter are the exhibits for the telephonic Rule 30(b)(6) deposition of Rapid Rack Industries, Inc., which at your suggestion, will go forward on Friday, September 26, 2008 at 8:30 a.m. PDT. I ask that you bring the box, with all the exhibits in it, to the conference room in which the deposition shall take place and deliver the same to the court reporter to mark in accordance with our instructions during the deposition. Please do not open the marked envelopes or review the notebook exhibits, as this could result in disorganization of the exhibits and possible delay.

To ensure that the deposition is handled as efficiently as possible, I would greatly appreciate it if you would provide the following information requested by the court reporter: (1) the identification of the conference room in which the deposition will take place; (2) the direct dial number for the conference room; and (3) the name of the deponent(s). If you are unable to get up with us with a specific dial in number, we will call the general number for your office at 8:15 a.m. PDT on September 26 and ask to be put in touch with one of you.

Patrick J. Orme
David A. Dillard
September 24, 2008
Page 2

We look forward to speaking with you this Friday. Do not hesitate to contact us before then with information or administrative questions or concerns.

Regards,

A handwritten signature in cursive script, appearing to read "Joe".

Joseph S. Dowdy

Enclosures

cc: David Harlow (w/o enclosures)
Reed Hollander (w/o enclosures)

Track Shipments/FedEx Kinko's Orders
Detailed Results

Tracking number 792112577799
Signed for by E.MORALES
Ship date Sep 24, 2008
Delivery date Sep 25, 2008 8:46 AM

Reference 27500/01509
Destination PASADENA, CA
Delivered to Mailroom
Service type Priority Overnight
Weight 39.0 lbs.

Status Delivered

Signature image available Yes

Date/Time	Activity	Location
Sep 25, 2008	8:46 AM Delivered	PASADENA, CA
	8:20 AM On FedEx vehicle for delivery	LOS ANGELES, CA
	7:38 AM At local FedEx facility	LOS ANGELES, CA
	4:25 AM Departed FedEx location	INDIANAPOLIS, IN
Sep 24, 2008	12:13 AM Arrived at FedEx location	INDIANAPOLIS, IN
	9:09 PM Left FedEx origin facility	RALEIGH, NC
	7:44 PM Picked up	RALEIGH, NC
	2:17 PM Package data transmitted to FedEx	

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EXHIBIT 4

1 Rhino Linings USA vs. Rapid Rack Industries, Inc
2 Deposition of Randy Taylor

3 **ROUGH DRAFT ONLY. NOT A CERTIFIED COPY**

4 Q. Would you state your full name please?

5 A. Harry Randall Taylor.

6 Q. Morning Mr. Taylor. As I mentioned earlier,
7 my name is Joseph Dowdy. I'm joined today [by|buy] my
8 colleague Reed Hollander but I'll be asking the
9 question we're both counsel for Rhino Linings USA, Inc
10 in this cancellation proceeding. If you don't mind
11 I'll go over a few ground rules. Basically especially
12 given that it's a telephonic deposition I'd appreciate
13 it if you'd given oral answers to questions and say yes
14 or no instead of uh-huh or uh-uh. If you need a break
15 at any time feel free to ask and I'm happy to
16 accommodate. I would just ask that if we're in the --
17 [once|ones] I ask a question that you answer it and
18 then we take a break. If you need to speak to your
19 attorney at any point during the deposition same thing
20 if you'd kindly just answer the question we're on and
21 then we'll take a break and you can speak to your
22 attorney. If you don't understand a question please
23 ask me to repeat it and I'm happy to try to rephrase it
24 and the same if you you [find|find] the question con-
25 fusing or if there's any question you have about a

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1 question receipt me no and I'll try to rephrase it in a
2 way you feel you can answer it. All that sound okay
3 [FPL] yeah that's fine okay. And if I may ask what is
4 your business address?

5 A. 14421 Bonelli, City of Industry California.

6 Q. To you live in the City of Industry?

7 A. No I do not.

8 Q. Where do you live?

9 A. In Whittier, California.

10 Q. How old are you, sir?

11 A. 52.

12 Q. Did you graduate from college?

13 A. No.

14 Q. What year did you graduate from high school?

15 A. Seven five.

16 Q. From what high school did you graduate?

17 A. Monte Vista High School.

18 Q. Are you currently employed by Rapid Rack

19 Industries, Inc.

20 A. Yes.

21 Q. Just going forward I'm going to use the term
22 Rapid Rack without the rest of it. You understand I'll
23 be referring to Rapid Rack without the Inc.

24 A. Yes.

25 Q. What is your position with Rapid Rack?

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1 A. Director of operations.
2 Q. How long have you held that position, sir?
3 A. I've got to think here. About a year, year
4 and a half.
5 Q. Did you hold a position with Rapid Rack
6 before that?
7 A. Yes.
8 Q. What position did you hold before that?
9 A. Just before this one.
10 Q. Yes, sir?
11 A. R and D manager.
12 Q. Research and development manager?
13 A. Yes.
14 Q. How long did you hold that position?
15 A. About a year and a half.
16 Q. Did you hold any positions with Rapid Rack
17 before that?
18 A. Yes.
19 Q. What was that position?
20 A. Engineering manager and customer service.
21 Q. Can you give me the approximate dates that
22 you held that position?
23 A. No.
24 Q. You cannot?
25 A. No, not really. I've been with the company

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1 for 20 years, so.
2 Q. Did you start with the company right out of
Page 3

3 high school?
4 A. No.
5 Q. When did you start with the company?
6 A. 1989.
7 Q. 1989?
8 Q. So since that time what positions have you
9 held other than that position than the ones you've
10 mentioned other than engineering customer service and
11 R&D manager and director of operations?
12 A. From the beginning I started out in outside
13 sales. Within a year or so I took over as inside sales
14 manager.
15 Q. Okay?
16 A. Then I took over as project management
17 manager.
18 Q. Okay?
19 A. Then I took over as engineering manager.
20 Q. Okay?
21 A. And as engineering manager I was over
22 customer service estimating and project management.
23 Q. Thank you. Have you had any involvement in
24 this litigation as far as responding to written
25 discovery requests or gathering responsive documents?

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1 A. Of documents, no.
2 Q. What about responding to any written
3 questions we may have sent to Rapid Rack?

4 MR. ORME: Hold on just a moment, Joe. Can
5 we go off the record for just one second.

6 (Off the record.)

7 MR. DOWDY: Sir, do you understand my
8 question?

9 MR. ORME: You may want to clarify it a
10 little more, yes please.

11 Q. Let me ask it first of all, have you been
12 involved in gathering documents in response to written
13 questions that I have submitted on behalf of my client
14 to Rapid Rack?

15 A. Is a --

16 MR. ORME: Objection; that's confusing. Can
17 you restate the question, please. I didn't understand
18 that question, Joe.

19 MR. DOWDY: Okay. Have you seen a document
20 in this litigation referred to as request for
21 production of documents and things.

22 A. No.

23 Q. As part of this litigation have you been
24 responsible for gathering any documents that were
25 produced in this litigation?

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1 A. A, ya- -- just as of last night or so.

2 Q. So before last night you didn't provide any
3 documents --

4 A. [Nor|No, sir].

5 Q. To be produced?

6 A. No.
7 Q. What documents were those?
8 A. Some information on the RR-4805, just a
9 [couple|customer] screen shots.
10 Q. Have you seen any written questions that have
11 been submitted to Rhino Linings?
12 A. Yeah.
13 Q. I'm sorry --strike that. Have you seen a
14 document entitled interrogatories to registrant as part
15 of this litigation?
16 A. Yes as of yesterday.
17 Q. Before yesterday you didn't see a document
18 entitled petitioners first set of interrogatories to
19 register?
20 A. No.
21 Q. And you didn't supply any answers to those
22 interrogatories?
23 A. No.
24 Q. Thank you. Do you understand that you're
25 being designated as a cup representative of behalf of

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1 Rapid Rack to give answers for the company today?
2 A. Yes.
3 Q. Madam court reporter if you could pull the
4 envelope marked rule 30(b)6 deposition notice and mark
5 the -- there's copies in this mark the contents as
6 Exhibit 1.

Randy Taylor.txt
(Exhibit No. 1 marked)?

MR. DOWDY:

Q. The court reporter has handed you what we've marked as Exhibit 1 Mr. Taylor. Have you seen this document before today?

A. No I have not.

MR. ORME: Do we have a copy for me.

MR. DOWDY: There should have been a copy for you.

MR. ORME: Okay. Thank you.

MR. DOWDY:

Q. Are you familiar with what this document is?

A. No.

Q. I will represent to you that it is a notice of deposition for the corporate deposition of Rapid Rack pursuant to this notice that you're testifying today. If you will, please turn with me to page two of this document. There's a section in bold and centered a little more than halfway down that says topics upon

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7

which examination is requested. Do you see that sir?

A. Yes I do.

Q. You see there are a number of topics, I believe one through 45 between page two and 9 listed there. Are you prepared to testify with respect to each of these topics today?

MR. ORME: Objection; we haven't -- that's not for him to respond to. I'm happy to tell you which

Page 7

9 topics hes willing to discuss today.

10 MR. DOWDY: Okay. what topics is he prepared
11 to discuss today?

12 MR. ORME: One.

13 MR. DOWDY: Okay.

14 MR. ORME: Two, six, seven, eight, 9, ten,
15 some of 11.

16 MR. DOWDY: which parts of 11.

17 MR. ORME: The -- well, you can ask questions
18 and you can find out the extent of his knowledge on
19 that on representing the corporation. 16, 17, 18, 19,
20 20, 21, 22, two three, two four, two five, two six, two
21 seven, 28, 29, that's it.

22 Q. (BY MR. DOWDY): Will someone else be
23 appearing today to testify as to the other topics?

24 MR. ORME: well, considering the extent of
25 topics that he will be testifying to we will not have

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1 another deponent available today. We expect this is
2 going to take most of the day.

3 MR. DOWDY: Okay. Hold on one moment.

4 (pause in proceeding) For purposes of the deposition
5 today Rapid Rack is refusing to [produce|product] a
6 witness for topics three through five, 11 through 15.

7 MR. ORME: Hold on just a moment, Joe. That
8 is not what we're saying. You have listed 45 topics
9 here in your notice of deposition.

10

MR. DOWDY: Yes, sir.

11

MR. ORME: To expect to get through 45 topic
of deposition in one day is really unreasonable and to
expect one person to be able to testify to all 45 is
also unreasonable. You have not given any indication
of how long these are going to take so we are not
refusing to produce somebody. We have looked at this
and said the extent of information that you are seeking
goes well beyond a single day of deposition
testimony.

20

MR. DOWDY: I'm just a little you know clear
as to why then you didn't move for a protective order
if you thought we needed -- in other words I listed and
asked somebody to appear today.

24

MR. ORME: And we have produced somebody to
appear. That's correct.

25

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MR. DOWDY: But not as to all topic. You
could have produced more than one person today. I've
done those kind of depositions before where there's
several people sitting there and we can ask -- and I
have not been given any notice today of which topic to
prepared to examine somebody on or to cover certain
topics as opposed to others.

8

MR. ORME: We have produced somebody who is
going to be testifying to nearly half of your topics
which are numerous in breadth and scope so we have
given -- you know we're producing someone that was

11

12 responsive to your notice of deposition.

13 MR. DOWDY: With the exception of the half of
14 the topics that you haven't produced somebody for? I
15 mean I guess my question is no one will be appearing
16 today with respect to those other topics that you
17 haven't listed already; is that correct.

18 MR. ORME: That is correct because you
19 haven't indicated how long this deposition will take
20 and given the breadth and scope of of what our witness
21 here today will testify to we believe that will take
22 most of the day.

23 MR. DOWDY: And just in case I'm missing
24 something did I get some kind of letter or something
25 indicating which topics somebody would not be produced

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1 today?

2 MR. ORME: Considering I'm not sitting at any
3 computer I can't answer that right at the most.

4 MR. DOWDY: So maybe or maybe not. I'll
5 represent just for purposes of the record, I don't
6 recall receiving anything that told me I would -- that
7 topics would be limited. But perhaps we can handle it
8 this way. If you'll -- just one moment. (Pause in
9 proceeding.)

10 Q. (BY MR. DOWDY): Mr. Taylor, sorry to get
11 away from you for a moment there. I'm going to ask you
12 some questions about the notice. I intend these to be

13 pretty straight forward yes or no questions.

14 Are you prepared to testify today with respect to
15 topic three listed on page two of the topics upon which
16 examination was requested.

17 A. Yes, I'll try.

18 Q. And same question with respect to topic four?

19 MR. ORME: Objection to the extent that we
20 haven't designated him for that. You're more than
21 welcome to ask questions. We are not holding him out
22 as the person who will be testifying on these topics;
23 however, you're free to explore his knowledge. I would
24 state that he on such topics he's testifying in a
25 personal capacity not as a 30(b)6.

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1 MR. DOWDY: If we finish the topics that
2 you've identified in four hours is someone else going
3 to be appearing today to cover the remaining topics.

4 MR. ORME: Well, at this point I wouldn't say
5 yes or no I would suspect no because I have a sneaky
6 suspicion with nearly half of the topic for which Randy
7 Taylor's been designated it will be longer than four
8 hours. Are you representing you will only take a four
9 hour deposition.

10 MR. DOWDY: I'm not saying that at all. I'm
11 requesting that inquiry be made and that we have
12 sufficient people there to testify on all the topics
13 upon which examination is requested for today given
14 that I haven't been given any notice that that was not

15 going to be the case and I'm asking him as the person
16 who's been designated, who's the rule 30(b)6 designee
17 of Rapid Rack Industry today, whether he is prepared to
18 testify as to topic four. I've got the speaking
19 objection on the record, but I want to know whether
20 he's prepared to testify for topic four for the
21 company.

22 MR. ORME: You're going in two directions
23 here, Joe. One was are we going to have another
24 30(b)6. My first question was will you be finished in
25 four hours with this witness?

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1 MR. DOWDY: I wouldn't -- I'm not committing
2 one way or the other.

3 MR. ORME: So you're asking us to bring other
4 deponents in and sit here all day and you have no idea
5 how long this will take; is that correct.

6 MR. DOWDY: That is not correct. What I'm
7 saying is I may ask a question about any of the topics
8 because the topics are interrelated. And I prepared
9 for this deposition in good faith believing that a
10 30(b)6 designee was going to be appear, one or more
11 30(b)6 designee to testify as to all the topics and I
12 don't have that right now. I came in sort of at the
13 last minute. Not even when I called and told you
14 needed 15 more minutes to the conference room ready,
15 not even then was I told I only had one person who was

16 only going to testify as to some topics. It's my
17 position he's the rule 30(b)6 designee. He can offer
18 testimony on the topics today or there's been a refusal
19 to produce with respect to the remaining topics and I
20 can ask about the topic he hasn't been designated on if
21 he does not have any evidence on offer then the company
22 doesn't have any evidence to offer. That's my position
23 on it.

24 MR. ORME: Okay. Well, let's first off
25 clarify the record. The reason I stated 15 minutes is

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1 your court reporter what not here this morning, and I
2 would make that very clear. It was Rhino Linings USA
3 was struck in traffic getting here, through no fault of
4 her own, and that's why I asked for a 15-minute delay
5 to accommodate Rhino Linings. Secondly, we are not
6 refusing to produce a deponent for other topics, there
7 you're mistaken. We have never stated we are refusing
8 to produce that. As you indicated, there is more --
9 you were expecting more than one 30(b)6 then you're
10 also in the same breath saying we want one deponent for
11 all of them. That's inconsistent. Please let me know
12 what exactly is your position.

13 MR. DOWDY: Okay. I didn't say the last part
14 Patrick. I want whoever is going to appear for the
15 company on 1, 2, 10, 20 to appear for the rule 30(b)6
16 deposition to appear for the Rule 30(b)6 deposition
17 that I'm prepared to take today. I don't care how many

18 people show up, and you know, if at the end of the day
19 because -- if I'm finish taking the deposition today
20 and there's no testimony offered on those topic that
21 I've asked questions about, then it's my position that
22 the company does not have any evidence to produce on
23 this topic. They haven't produced a designee and they
24 refused to appear as to those topics.

25 MR. ORME: Well, that's not the case

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1 whatsoever. We're not refusing. We have offered up a
2 deponent in good faith believing that he is going to
3 testify nearly half of the 45 different topics you have
4 requested and in order to get through 45 topics it's
5 going to take the entire day. If as I asked you
6 earlier, it's only going to take you four hours and we
7 can consider getting someone else here to testify on
8 other topics. So if you give me a time limit as to
9 what -- how long you will be deposing Mr. Taylor, I'll
10 be happy to inquire into having another deponent. And
11 we are not stating there was no evidence, and I think
12 that is just a complete misstatement and unreasonable
13 on you part to even put forth such an accusation.
14 Okay.

15 MR. DOWDY: Patrick, there's nobody being
16 produced to testify as to the discovery responses that
17 have been given and the documents produced. Is it your
18 position that you're not -- I mean, no, I'm not going

19 to -- there's so many ways to go with this. First of
20 all, I'm not going to limit my examination. I'm going
21 to ask the question and what -- I'm not require by law
22 to ask them in any particular order. Rapid Rack nor
23 its counsel get to choose what order I ask the
24 questions in. It's my deposition.

25 MR. ORME: We've never stated that was the

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1 case, Joe, so please don't misstates what I've put
2 forth.

3 MR. DOWDY: what if I want to ask questions
4 about number four first? who's going to respond to
5 those right now? Let's say that's what I want to talk
6 about first.

7 MR. ORME: I want to ask you. We could
8 designate more than one person for different 30(b)6
9 topics. I would hope you understand that.

10 MR. DOWDY: I do --

11 MR. ORME: Hold on a moment, please. If you
12 want to ask a question with regard to number four, you
13 want us us to have one deponent, then if you want to go
14 to topic number one, of which we've designated Randy
15 Taylor, we're going to stop, swear in another witness
16 and go back and forth with multiple witness all day?
17 Is that what you're proposing?

18 MR. DOWDY: got it all. They all be sworn in
19 and they all ask -- whenever I've done it in the past,
20 you swear in all three witnesses at once, they sit

21 wherever they sit around the table and then when you
22 ask a question the appropriate designee answers it.
23 MR. DOWDY: I ask that we go off the record.
24 I'm going to put you on mute and we'll be right back.
25 (Off the record.)

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1 MR. ORME: Okay. We're back on the record.
2 THE COURT REPORTER: Counsel, I just want to
3 clarify something. I had the deposition start time for
4 this deposition as 8:30. I was in the lobby at 8:20
5 and asked for five minutes to set up. I was in
6 traffic, but I did not get here after 8:30.
7 MR. DOWDY: I understood.
8 MR. ORME: You know, Joe, I have never heard
9 of taking multiple deponents at one time. Can you
10 please provide me case law that supports a proposition
11 if that's really how you would like to proceed. Like I
12 said, I've never heard of multiple deponents, one
13 having multiple deponents for the court reporter to
14 take care of multiple witnesses and who's testifying.
15 I think perhaps we should take this up with the
16 interlocutory attorney, but that's your decision. You
17 need to agree however that we are not refusing to
18 produce evidence to topics that Mr. Taylor's not
19 designated on.
20 MR. DOWDY: I do not agree with that, but
21 here's what I propose, Patrick: You know my position.

22 Let's just proceed with the deposition and if the
23 deponent does not know the answer to my question then
24 he'll say he does not know. I understand it's your
25 position that you haven't designated him and you don't

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1 believe that will be the binding on the company as long
2 as you understand it's my position that it is. We
3 might as well see what we can accomplish what we can
4 today.

5 MR. ORME: If it's your position that it is,
6 please provide me where case law supports multiple
7 deponents at one time.

8 MR. DOWDY: I'm not arguing a motion today
9 MR. ORME: Though, Patrick.

10 MR. ORME: No, and I realize that Joe and I'm
11 not saying you're arguing a motion however your
12 statement for the record is inaccurate stating that we
13 have to have multiple deponents at one time and is that
14 still your position?

15 MR. DOWDY: It's my position that one or more
16 persons had to be present today to testify as to each
17 of the topics I've designated unless you move for
18 protective order at a time or contacted me and asked to
19 conduct it with respect to limit topics. I am reading
20 rule 30(b)6, it says the organization so named shall
21 designate one or more officers or directors, officers
22 managing agent or person who consents to testify on its
23 behalf and may set forth for each person designated the

24 matters on which the person will testify. In other
25 words, I think they all had to show up today and you

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1 had to tell me who was testifying as to what. That's
2 fine. But to just bring one person and say today we
3 only want to have the deposition on certain topics
4 you've noticed and we don't want you to proceed with
5 the notice on remaining topics, I object, to that I
6 don't believe that's what the law says. But I think we
7 should move on.

8 MR. ORME: So I just want to make sure I'm
9 clear on what you're stating. You're stating we should
10 have multiple witnesses here at one time so you can ask
11 different witnesses questions in any order you want; is
12 that correct.

13 MR. DOWDY: Or do the witnesses sequentially.
14 I can see how we can work it out the way you say. If
15 you wanted to show up with several witnesses today and
16 say look we've got the following people on following
17 topics then I could choose in what order I want to
18 depose those witnesses. What's been done instead is
19 I've been told we only want to testify today on certain
20 topics and that's who we're bringing and the company
21 isn't going to produce a witness with respect to the
22 other ones at least not today.

23 MR. ORME: Now, Joe, that's inconsistent from
24 what you've stated earlier where you said you've done

25 this several times where you have multiple witnesses

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1 being depose.

2 MR. DOWDY: I said you can can it either way,
3 Patrick. You've done it neither way. It does not
4 matter. It does not matter which way we do it whether
5 we do it one witness at a time all in one day or
6 several witnesses all at once, both of which are
7 perfectly lawful but it doesn't matter which way you do
8 it. You've done neither. What I've got today is one
9 witness on certain topics and I've been told there's
10 certain things we're going to testify to today and
11 certain things we're not going to testify to today and,
12 you know, being that the case, I don't disagree that
13 it's an issue we can take up with the Board but what
14 I'd like to do now is proceed with my deposition and we
15 understand what are relative positions are on what the
16 answers count for.

17 MR. ORME: First off we have met our obligation we
18 produced a deponent that is willing to discuss certain
19 topics. Rule 30(b)6 does not require single deponent
20 knowledgeable on all topics. You have failed to
21 indicate how long this deposition will occur to the
22 extent that this witness has not been designated for
23 another 30(b)6 topics in no way it Rapid Rack
24 Industries indicating they will not produce evidence or
25 produce a deponent to those topics. We'll make that

1 perfectly clear. And to the extent the witness cannot
2 answer to a topic he's not been designated on in no way
3 it Rapid Rack admitting they don't have evidence on
4 those grounds we will proceed with the deposition.

5 MR. DOWDY: I don't consent with that, but I
6 agree to proceed with the deposition. We'll let the
7 Board decide what it means.

8 MR. ORME: That's fine.

9 Q. Mr. Taylor, are you prepared to testify as to
10 topic four listed on the deposition notice today?

11 A. No.

12 Q. Are you prepared to testify as to topic five
13 listed on the notice of deposition today?

14 A. No.

15 Q. Are you prepared to testify as to topics
16 number 11 in the deposition notice?

17 A. No.

18 Q. For the company?

19 A. No.

20 Q. Are you prepared to testify as to topics 12
21 listed in the deposition notice for the company?

22 A. No.

23 Q. Are you prepared to testify for the company
24 as to topics 13 of the deposition notice?

25 A. No.

1 Q. Are you prepared testify as to topics 14
2 listed on the deposition notice for the company?

3 A. No.

4 Q. Are you prepared to testify for the company
5 as to topics 15 listed in the deposition notice?

6 A. No.

7 Q. ?

8 Q. Are you prepared to testify for the company
9 as to topics 30 for the company?

10 A. No.

11 Q. What about with respect to topics three 1 are
12 you prepared to testify for the company with respect to
13 that topics?

14 A. No.

15 Q. With respect to topics three two are you
16 prepared to testify for the company as to that topics?

17 A. No.

18 Q. I'm going to ask the same question and please
19 feel free to take time and read them I'm not trying to
20 rush your answer I'm going to ask you the same question
21 with respect to topics 33 through 45. The question is
22 are you prepared to testify for the company with
23 respect to those topics?

24 A. Of those you just named only number 39.

25 Q. I'm sorry did you hear my question so you are

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1 prepared to testify as to topics 39 on behalf of the
2 company?

3 A. Yes.

4 Q. But as to the remaining ones that we listed
5 of 33 through 45 you are not prepared to testify for
6 the company?

7 A. Correct.

8 Q. Thank you Mr. Taylor. How did you prepared
9 for this deposition today? And if may when I'm asking
10 the next questions I'm not asking what your counsel may
11 have told you or anything like that please don't tell
12 me anything your lawyers told you. That's not going to
13 be what I'm asking. With that caveat how did you
14 prepare for this deposition today

15 A. I actually very little. I mean I looked for
16 a few part numbers last night but that was all. The
17 first I heard of this was yesterday.

18 Q. Did you have any meetings or conversations
19 other than with your attorney to prepare for this
20 deposition?

21 A. No.

22 Q. Did you review any documents?

23 A. No.

24 Q. If you would estimate how much time did you
25 spend preparing?

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1 A. Maybe an hour.
2 Q. Thank you because this is a rule 30 B
3 deposition I'm going to use the word you. If we can
4 just be clearing when I use the word you I'm referring
5 to Rapid Rack and not you individually unless I specify
6 otherwise do you understand that?
7 A. Yes.
8 Q. What's nature of the business conducted by
9 Rapid Rack?
10 A. Manufacturer of boltless, for consumer and
11 industrial shelving.
12 Q. You manufacture boltless consumer and
13 industrial shelving product?
14 A. That's correct.
15 Q. Where are those products manufactured?
16 A. City of Industry California.
17 Q. There all manufactured on site there?
18 A. You didn't let me finish sir.
19 Q. I'm sorry?
20 A. City of industry California and also in
21 China.
22 Q. Is there sort of a rough break down as to
23 which products are manufactured in city of industry and
24 which products are manufactured in China?
25 MR. ORME Objection; vague, which products

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24

1 are you specifying on Joe?

2 MR. DOWDY: You understand my question, sir.
Page 23

3 A. Yes.
4 Q. Please go ahead and answer it.
5 A. City of industry is industrial and consumer.
6 Shine a is consumer.
7 Q. Which industrial and consumer products are
8 manufactured in the city of industry?
9 A. Can you clarify that, please?
10 Q. Is there like a category are there certain
11 divisions within the company most products are
12 manufactured in city industry and other products are
13 manufactured in China?
14 MR. ORME: Objection assumes facts not in
15 evidence with respect to the company structure.
16 MR. DOWDY: Do you understand my question,
17 sir.
18 A. No, sir.
19 Q. (BY MR. DOWDY): How to you determine which
20 products will be manufactured in the City of Industry
21 which products will be manufactured in China?
22 A. That's done actually it would be the decision
23 of the president of the company.
24 Q. Do you know how he determines which products
25 are manufactured where?

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1 A. No I do not.
2 Q. Are there divisions with Rapid Rack?
3 A. Yes.

- 4 Q. Can you describe those divisions for me?
- 5 A. What type of description would you like.
- 6 Q. Well just to start off with can you identify
- 7 what the divisions are?
- 8 A. Yes. Industrial, then there's the consumer
- 9 Gorilla Rack and consumer Rhino Rack.
- 10 Q. Can you tell me what those divisions do
- 11 starting with the the industrial what does that
- 12 division do?
- 13 A. Produced industrial shelving for back room
- 14 storage for industrial customers, distributors and
- 15 dealers.
- 16 Q. What about consumer Gorilla Rack, produces
- 17 boltless shelving for come consuming products for
- 18 resale?
- 19 Q. What about consumer Rhino Rack?
- 20 A. Products consumer product for resale for
- 21 consumer sales.
- 22 Q. Why are there separate divisions for gorilla
- 23 rack and Rhino Rack?
- 24 A. Different price points.
- 25 Q. What are the different price points?

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□

- 1 A. That would be --
- 2 MR. ORME: Objection vague.
- 3 THE WITNESS: Yeah, that's --
- 4 Q. (BY MR. DOWDY): Well how is the distinction
- 5 drawn you noted a distinction based on price point.

6 How is that distinction drawn?
7 A. Quality of product.
8 Q. What do you mean by quality of product?
9 A. Gauge difference.
10 Q. What do you mean by gauge difference?
11 A. I don't understand your question at that
12 point.
13 Q. [Its|It's] quality of product. Does one
14 product have a higher quality than the other?
15 A. It can have -- yes as far as capacity.
16 Q. Which product is of higher quality?
17 A. Generally Gorilla.
18 Q. How does Rapid Rack advertise its products?
19 MR. ORME: Objection vague which products are
20 you referring to?
21 MR. DOWDY: Generally, how does the company
22 advertise, what methods of advertising does Rapid Rack
23 use.
24 MR. ORME: Same objection.
25 MR. DOWDY: Do you understand my question.

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1 A. Not completely.
2 Q. (BY MR. DOWDY): With respect to the
3 industrial division of Rap- -- well, strike that
4 question.
5 Is there an advertising division of Rapid Rack or
6 department?

- 7 A. Advertising, no.
- 8 Q. Is this a marketing -- are there people in
- 9 the company employed to handle marketing or advertising
- 10 of the product?
- 11 A. Marketing, yes.
- 12 Q. Who are those people?
- 13 A. Dana Coelho and that's it.
- 14 Q. How does Rapid Rack advertise its products in
- 15 the Rhino Rack division.
- 16 A. Websites.
- 17 Q. What websites is that?
- 18 A. I don't know.
- 19 Q. Any other ways you're aware of that it
- 20 advertises -- that the Rhino Rack division advertises
- 21 its products?
- 22 A. Not to my knowledge.
- 23 Q. Okay with respect to the Gorilla racks, do
- 24 you know how Rapid Rack advertises the products within
- 25 the Gorilla rack division?

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- 1 A. Website.
- 2 Q. Are you aware of which website?
- 3 A. Gorilla rack it's the Gorilla rack website
- 4 and a Rapid Rack website.
- 5 Q. Is there a Rhino Rack website?
- 6 A. Not to my knowledge.
- 7 Q. What about products in the industrial
- 8 division; how does Rapid Rack advertise those products?

9 A. Rapid Rack website.
10 Q. Any other methods of advertising with respect
11 to those products that you're aware?
12 A. Not that I'm aware of.
13 Q. And does Rapid Rack sell products?
14 MR. ORME: Vague.
15 THE WITNESS: Yes.
16 MR. ORME: Objection; which products are you
17 indicating?
18 MR. DOWDY: Any products.
19 MR. ORME: Same objection.
20 MR. DOWDY: You understand my question, sir.
21 Q. Could you reword it?
22 A. My question is this is the company involved
23 in sales of products any products at all.
24 A. Yes.
25 Q. Does Rapid Rack sell products directly or

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1 does it use distributors?
2 A. Both.
3 Q. Understand what circumstances -- well strike
4 the question?
5 when does Rapid Rack use a distributor and when
6 does Rapid Rack sell products directly?
7 MR. ORME: Objection; vague.
8 MR. DOWDY: Please answer if you can sir.
9 A. That would be a management decision.

10 Q. (BY MR. DOWDY): You know how management
11 makes that decision?
12 A. No I do not.
13 Q. Does Rapid Rack have any parent
14 [companies|company's]?
15 A. Yes.
16 Q. What are those [companies|company's]?
17 A. Patriarch.
18 Q. Is patriarch -- is Rapid Rack wholly owned
19 subsidiary of patriarch?
20 A. I would have no knowledge of that.
21 Q. You don't know the answer to that on?
22 A. No, I do not.
23 Q. What's the full name of Patriarch?
24 A. I don't know.
25 Q. Does Rapid Rack have any subsidiaries?

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1 A. Not to my knowledge.
2 Q. At Rapid Rack who's responsible for over
3 seeing -- well, strike the question. Sir, is it true
4 that Rapid Rack is owner of registration number 1698407
5 for the mark Rhino Rack?
6 A. I wouldn't actually no that.
7 Q. You don't know the answer to that?
8 A. No, sir.
9 Q. Do you know when Rapid Rack first filed for
10 trademark right with respect to the Rhino Rack mark?
11 MR. ORME: Objection; question for which he's
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12 not designated?

13 MR. DOWDY: Please answer, sir.

14 A. No.

15 Q. (BY MR. DOWDY): From now on I'm going to
16 refer to the Rhino Rack mark the registrant content*
17 that I have I'm going to use the sort hand term
18 registrant's mark or Rhino Rack mark do you understand
19 that sir?

20 A. Yes.

21 Q. Do you know when Rhino Rack first filed a
22 specimen of use with United States Patent and trademark
23 office for the Rhino Rack mark?

24 MR. ORME: Objection topics for which he's
25 not designated. Please answer.

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1 A. No.

2 Q. (BY MR. DOWDY): Do you know what the
3 specimen of use was that was first filed with United
4 States Patent and trademark office?

5 A. Same objection.

6 MR. DOWDY: I'll give you a running objection
7 to those Patrick.

8 MR. ORME: Okay.

9 A. No.

10 MR. ORME: However, I think I'll insert it
11 just to have it clear on the record.

12 MR. DOWDY: Understood.

13 Q. (BY MR. DOWDY): Sir, do you know whether the
14 Rhino Rack mark is registered for the following goods
15 work tables with and without wheels, work benches
16 industrial shelving, storage rack and component parts
17 there ever?

18 MR. ORME: Objection; compound okay asking
19 for topics for which he's not designated.

20 MR. DOWDY: Please answer.

21 A. No.

22 Q. (BY MR. DOWDY): Do you know what a work
23 table is, sir as it's defined in the registration?

24 MR. ORME: Objection; topics for which he's
25 not designated. He can only answer individual

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1 capacity.

2 MR. DOWDY: That's for the board, but please
3 answer if you can, sir please answer the question. Do
4 you know what a work table is as described in the
5 registration?

6 MR. ORME: Same objection.

7 A. No.

8 Q. (BY MR. DOWDY): Do you know what a work
9 bench is as described in the declaration?

10 MR. ORME: Same objection.

11 A. No.

12 Q. Do you know what industrial shelving is as
13 described in the registration?

14 MR. ORME: Same objection.
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15 A. No.

16 MR. DOWDY: Do you know what a storage rack
17 is as defined in the registration?

18 MR. ORME: Same objection.

19 A. No.

20 Q. (BY MR. DOWDY): Do you know what component
21 parts for those items would be as described in the
22 registration?

23 MR. ORME: Same objection.

24 A. No.

25 Q. (BY MR. DOWDY): Do you know whether the

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1 registration includes cabinetry?

2 MR. ORME: Same objection.

3 A. No.

4 Q. (BY MR. ORME): Do you know whether the
5 registration includes consumer shelving?

6 MR. ORME: Same objection.

7 A. No.

8 Q. (BY MR. ORME): Do you know whether the
9 registration includes work tops?

10 MR. ORME: Same objection.

11 A. No.

12 Q. (BY MR. DOWDY): Do you know if there's a
13 different between consumer shelving and industrial
14 shelving?

15 A. Yes.

16 Q. What is that difference?
17 A. Again it's quality and gauges.
18 Q. What gauges qualify industrial shelving?
19 A. 14, 16, 20.
20 Q. What about consumer shelving?
21 A. It varies. 18 occasionally 16.
22 Q. Any others?
23 A. Not that I'm aware of.
24 Q. And the gauge you're referring to, is that
25 the gauge of the -- is it steel that's used?

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1 A. Yes.
2 Q. Other than the gauge how does the quality
3 differ as between industrial shelving and consumer
4 shelving?
5 A. It doesn't.
6 Q. You say 16 is sometimes used in both consumer
7 and industrial shelving?
8 A. Correct.
9 MR. DOWDY: Madam court reporter, if I may,
10 there's an envelope marked declaration of use. Can I
11 have that opened and marked please.
12 (Exhibit No. 2 marked.)
13 MR. DOWDY: Thank you kindly.
14 Q. (BY MR. DOWDY): If you will turn to what
15 been marked Exhibit 2, sir you see it says declaration
16 at the top?
17 A. Yes.

18 Q. You see it's signed by someone named *Ray
19 [HRA] Hahn?
20 A. Yes.
21 Q. You know Mr. *Law Hann?
22 A. Yes.
23 Q. Who is Mr. Law Hann?
24 MR. ORME: I'm sorry. I didn't hear you.
25 Q. (BY MR. DOWDY): Who is Mr. *Law Hann?

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1 A. Former president and chairman of the board of
2 Rapid Rack.
3 MR. DOWDY: Did you speak with Mr. Law Hann
4 as part of him making this declaration that we're
5 looking at?
6 A. No.
7 Q. Do you know what information he had available
8 to him or that he was reviewing when he made this
9 declaration?
10 MR. ORME: Objection; calls for speculation.
11 Q. (BY MR. DOWDY): Do you know the answer to
12 the question, sir you as I've defined it?
13 A. No.
14 MR. ORME: I'm going to object. Can you --
15 how did you define you? I just want to make sure I
16 know.
17 MR. DOWDY: As the company.
18 MR. ORME: Can you repeat the question.

19 MR. DOWDY: The questions been asked and
20 answered. You can read it back, Madam Court Reporter
21 if you would.
22 MR. ORME: Read that back please.
23 (Record read.)
24 A. Do you understand it.
25 MR. DOWDY: We'll move on. I'm asking do you

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1 know and you under we've talked about rule 30(b)6
2 designee I'm asking as we sit here today do you know
3 what information Mr. Law Hann had in front of him when
4 he made this declaration.

5 MR. ORME: Objection you can go ahead and
6 answer it.

7 A. No.

8 Q. (BY MR. DOWDY): Do you know if the
9 information that he provided in this declaration was
10 accurate or not?

11 MR. ORME: Objection.

12 A. No.

13 Q. (BY MR. DOWDY):

14 Q. Did you use the Rhino Rack mark in calendar
15 year 1998?

16 A. I'm not sure that that's the year I started.
17 Oh excuse me '98.

18 Q. Yes 98?

19 A. As far as I know, yes.

20 Q. What's the basis? You said as far as you
Page 35

21 know. what's the basis for that your answer yes?

22 A. Just some of what I actually found last night
23 on the internet or excuse me on are computer system.

24 Q. what did you find on your computer system
25 that led you to believe that?

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1 A. RR-4805 sales history.

2 Q. So you believe you used it on RR-4805 in
3 1998?

4 A. I believe so.

5 Q. How do you know that it was used on RR-4805
6 in 1998?

7 A. Just from what I found on are computer
8 system.

9 Q. what is that, sir what did you find on your
10 computer system?

11 A. Sales information.

12 Q. Does the sales information show the
13 trademark?

14 MR. ORME: Objection. which trademarks.

15 MR. DOWDY: The Rhino Rack mark.

16 A. No.

17 Q. (BY MR. DOWDY): Did you use the mark in
18 calendar year 1990?

19 MR. ORME: Objection; vague. You're
20 referring to the Rhino Rack mark.

21 MR. DOWDY: If I use the term mark and I

22 don't specify otherwise, I'm referring to the Rhino
23 Rack mark. Did you use the Rhino Rack mark in calendar
24 year 1999?

25 A. Yes.

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1 Q. What's the basis for your statement that you
2 did?

3 A. Information found on the computer.

4 Q. What information did you find on the
5 computer?

6 A. Sales of the RR-4805.

7 Q. Does that sales information show the Rhino
8 Rack trademark?

9 A. No.

10 Q. Did you use the Rhino Rack mark in calendar
11 year 2000?

12 A. Yes.

13 Q. What's the basis of that answer?

14 A. Sales found on the computer system.

15 Q. Sales of which product?

16 A. RR-4805.

17 Q. Are there any other products that you're
18 basing that answer on?

19 A. No.

20 Q. Does that sales information for 2000 show the
21 Rhino Rack mark?

22 A. No.

23 Q. Did you use the Rhino Rack mark in calendar

24 year 2001?

25 A. Yes.

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1 Q. What's the basis of that answer?

2 A. Sales for the RR-4805 found on our computer
3 system.

4 Q. Any other products upon which that answer is
5 based?

6 A. No.

7 Q. Does that sales information that you reviewed
8 show the Rhino Rack mark?

9 A. No.

10 Q. Did you use the Rhino Rack mark in calendar
11 year 2002?

12 A. Yes.

13 Q. What's the basis of that yes answer?

14 A. Sales on the computer system of the RR-4805.

15 Q. Is it based on sales of any other products?

16 A. No.

17 Q. Did that sales information show use of the
18 Rhino Rack mark?

19 A. No.

20 Q. Did you use the Rhino Rack mark in calendar
21 year 2003?

22 A. Yes.

23 Q. What's the basis of that yes answer?

24 A. Sales of the RR-4805 on the computer system.

Randy Taylor.txt
25 Q. So it is [your|you're] contention that there

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1 were sales of RR-4805 in 2003?

2 A. Yes.

3 Q. Is that answer based on sales of any other
4 products?

5 A. No.

6 Q. Does that sales information show the use of
7 the Rhino Rack mark?

8 A. No.

9 Q. Did you use the Rhino Rack mark in calendar
10 year 2004?

11 A. I have no knowledge of that.

12 Q. Did you use the Rhino Rack mark in calendar
13 year 2005?

14 A. I have no personal knowledge of that.

15 Q. Did you use the Rhino Rack mark in calendar
16 year 2006?

17 A. No personal knowledge of that.

18 Q. Did you use the Rhino Rack mark in calendar
19 year 2007?

20 A. Yes.

21 Q. What is the basis of that yes answer?

22 A. Personal knowledge of packaging or package
23 units on the floor.

24 Q. Which package units were those?

25 A. GRL-100 and GRL-3012.

□

1 Q. Let me ask you -- well, hold on. Just give
2 me one second I'm going to go on mute. This will only
3 take a second. Sorry about that Mr. Taylor.

4 Q. (BY MR. DOWDY): How do you know that the
5 Rhino Rack mark was used on RR-4805 between 1998 and
6 2003?

7 MR. ORME: Objection; asked and answered.

8 MR. DOWDY: You can answer the question.

9 A. Just based on the part number and description
10 on the sales orders.

11 Q. (BY MR. DOWDY): It's not based on anything
12 else?

13 A. No.

14 Q. What was the part number what are you
15 referring to [by|buy] the term part number?

16 A. RR-4805.

17 Q. And description of sales, what do you mean by
18 that?

19 A. Description on the sales order itself states
20 Rhino.

21 MR. ORME: We're gonna take a break for a
22 moment. We've been going for it looks like a little
23 over an hour so the deponent needs to take a break.

24 MR. DOWDY: I'll stay on mute. You can do
25 the same let's plan to come back in ten minutes.

1 MR. ORME: Ten minutes or so exactly.
2 MR. DOWDY: Okay thanks. Off the record.
3 (Off the record.)
4 MR. DOWDY: Madam Court Reporter, if you
5 will, there's one of the big binders it's marked Rapid
6 Rack Documents Production. I'd like that marked as
7 Exhibit 3, and for the record there are some documents
8 in there that Rapid Rack has designated as confidential
9 or as highly confidential and this need to be protected
10 with utmost protection not disclosed to anyone public
11 private or otherwise. In fact, it needs to be sealed.
12 MR. ORME: to the extent you're asking
13 questions from these trade secret commercially
14 sensitive documents. I would ask that that portion of
15 the transcript be designated AEO.
16 MR. DOWDY: okay. Clarify what do you mean
17 by that.
18 MR. ORME: Attorneys eyes only.
19 MR. DOWDY: I understand. This is exhibit
20 number?
21 MR. ORME: Three.
22 (Exhibit No. 3 marked.)
23 MR. DOWDY: We Mr. Taylor do you know what
24 the process was at Rapid Rack for gathering documents
25 responsive to petitioners request for production of

1 documents?

2 MR. ORME: Objection; outside the scope of
3 his designated testimony.

4 A. No.

5 Q. (BY MR. DOWDY): Do you know who was involved
6 in that process?

7 MR. ORME: Same objection.

8 A. No.

9 Q. Do you know how Rapid Rack determined which
10 documents were responsive and which were not responsive

11 MR. ORME: Same objection.

12 A. No.

13 Q. (BY MR. DOWDY): Has Rapid Rack produced all
14 documents in its possession and control which it
15 believe to be responsive to the the question?

16 MR. ORME: Same objection; outside scope of
17 his designated topics.

18 A. I don't know how to word that one. Repeat
19 that, please.

20 MR. DOWDY: Yes. Has Rapid Rack produced all
21 documents in its possession and control which it
22 believes are responsive to petitioners request for
23 production of documents?

24 MR. ORME: Same objection.

25 MR. DOWDY: Answer, please.

1 A. To the best of my knowledge.

2 Q. (BY MR. DOWDY): Has Rapid Rack withheld any
3 documents?

4 MR. ORME: Same objection.

5 MR. DOWDY: Not to my personal knowledge.

6 MR. DOWDY: Okay.

7 Q. (BY MR. DOWDY): The pages in the binder and
8 this I believe has been marked as exhibit three. It
9 has numbers on the lower right-hand side corner and I'm
10 going to refer to only the numbers on the farthest
11 right-hand side. So in other words, the first page I
12 would call that one. Would you turn to page 505
13 please. Actually I read my own handwriting wrong. I
14 506

15 MR. ORME: Counsel, 506 in my book appears to
16 be almost a black page with no details that you can
17 really see in whatever is there.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
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Also are you able to tell what the

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23 MR. ORME: I'm going to object to the extent
24 that Exhibit 3 is outside the scope of his testimony.
25 we've already stated he's not testifying with respect

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1 to topics 37.

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6 [REDACTED]
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11 [REDACTED]

12 MR. ORME: Objection. When you refer to you
13 are you referring to, the company or are you referring
14 to him in his individual capacity?

15 MR. DOWDY: You means company in this
16 deposition.

17 [REDACTED]
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12 Q. (BY MR. DOWDY): True, is it not that
13 GRL-3012-5DI was not sold before March 2007; is that
14 correct?

15 A. I don't have any personal knowledge on that.

16 [REDACTED]
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18 [REDACTED]
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1 MR. ORME: I'm just going to object to the
2 extent this is outside the scope of his designated
3 topics.

4 MR. DOWDY: You're objecting -- you're not
5 saying it's not in the Notice of Deposition; you're
6 objecting to the extent you say he has not been
7 designated a witness for this; is that right?

8 MR. ORME: That's correct.

9 [REDACTED]
10 [REDACTED]
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12 [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
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15 [REDACTED]
16 MR. ORME: Objection; outside the scope of
17 his designated topics.

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16 MR. ORME: Objection; calls for speculation,
17 outside the scope of his designated testimony.

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 MR. ORME: Objection; calls for speculation.

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 MR. ORME: Objection; calls for speculation.

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16 [REDACTED]

17 Q. Mr. Taylor, earlier I believe you referenced
18 that GRL-100 and GRL-3012 that you had see boxes with
19 the Rhino Rack mark on them; correct?

20 A. Correct.

21 Q. Other than your personal knowledge of having

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22 seen those boxes -- was that in 2007, you said?

23 A. Yes, and beyond.

24 Q. And since then?

25 A. Yes.

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1 Q. Prior to that, do you have any personal
2 knowledge of whether GRL-100 or GRL-3012 had the Rhino
3 Rack mark on it?

4 A. I have no personal knowledge of that.

5 Q. What does GRL stand for in the GRL-100?

6 A. Gorilla Rack Light.

7 Q. So when GRL appears in a number, that means
8 Gorilla Rack Light; is that correct?

9 MR. ORME: Objection.

10 Q. (BY MR. DOWDY): Is that correct?

11 A. Well, light means that's a different version,
12 which would be Rhino.

13 Q. Is there a different prefix for Gorilla Rack
14 products and Gorilla Rack Light products?

15 MR. ORME: Objection; I'm sorry, Joe, I
16 didn't understand that question.

17 Q. (BY MR. DOWDY): In other words, if GRL means
18 Gorilla Rack Light; is there a different prefix for
19 Gorilla Rack products that are not Gorilla Rack Light
20 products?

21 A. I think that varies by part number because
22 they are just part numbers.

23 Q. So the part number may or may not tell you

24 whether the Rhino Rack mark is used on a product?

25 MR. ORME: Objection; misstates prior

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1 testimony.

2 MR. DOWDY: Please answer the question,
3 Mr. Taylor.

4 A. I'm not sure on that.

5 MR. DOWDY: Patrick, may I have like three
6 minutes just to take a quick stretch break?

7 MR. ORME: Sure.

8 (Off the record.)

9 MR. ORME: I'm going to object. This is the
10 first time we've seen this document. There's no Bates
11 number. I don't know where it came from.

12 (Exhibit 4 marked.)

13 Q. (BY MR. DOWDY): What request to production
14 of documents do you contend it would have been
15 responsive to?

16 MR. ORME: We can take a break and I can pull
17 them all out so why don't we take a five minute break
18 then.

19 MR. DOWDY: Wait a minute. You said I
20 haven't produced it.

21 MR. ORME: If you're going to produce a
22 document that you are why are going to question a
23 witness on you don't produce it the first time in a
24 deposition. Let's go on. I just want to put my

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25 objection on the record.

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1 MR. DOWDY: Do we agree that you have not
2 submitted request for production of documents to my
3 client in this action?

4 MR. ORME: That's correct.

5 Q. (BY MR. DOWDY): Mr. Taylor, I'll ask you to
6 look at what's been marked as Exhibit 4, please?

7 A. Okay.

8 Q. Do you recognize this?

9 A. No I have never seen this before.

10 Q. Do you know if this is the package insert
11 instructions for unit assembly for produce numbers
12 GRL-100 and GRL-110?

13 MR. ORME: Objection; lack of foundation.

14 MR. DOWDY: Do you know is the question, sir.

15 A. I personally do not know.

16 Q. Do you know what the package insert
17 instructions for unit assembly look like for GRL-100 or
18 GRL-110

19 A. No, I do not.

20 Q. Do you know whether this document appears on
21 the Gorilla Rack Website?

22 MR. ORME: Objection; beyond the scope of his
23 designated topics. You can go ahead and answer.

24 A. No I do not. I was thinking.

25 MR. DOWDY: I think it's topic 27 to which he

1 said he was in fact -- he was designated for topic 27
2 if you want to withdraw that then I'll allow it.

3 MR. ORME: No, topic 27 is with Gorilla Rack
4 not Gorilla Rack Light. This is actually outside the
5 scope of anything you've designated.

6 Q. (BY MR. DOWDY): Okay. Well, would you agree
7 with me, sir, that this is not -- well, if you look at
8 the bottom if the very bottom in the center it says
9 www.Gorillarak.com?

10 A. I see that.

11 Q. Does it appear to you that this document came
12 from the Gorilla Rack's website by Rapid Rack?

13 MR. ORME: Objection; assumes facts not in
14 evidence.

15 A. Not sure.

16 Q. Okay. You agree with me that the Rhino Rack
17 mark does not appear on this Exhibit 4?

18 MR. ORME: Take the time to review the
19 document.

20 MR. DOWDY: Yeah, I would say so. Take all
21 the time you need.

22 A. Because I've never seen this. I don't see
23 any reference to Rhino Rack on here.

24 Q. Are you familiar with the Gorilla Rack
25 website?

1 A. Not really.

2 Q. Have you ever reviewed the Gorilla Rack

3 website?

4 A. Not in over a year.

5 Q. Do you know whether the Rhino Rack mark

6 appears anywhere on the Gorilla Rack website?

7 A. I would have no personal knowledge of that.

8 Q. Are you familiar with the Rapid Rack website?

9 MR. ORME: Objection; you're going outside

10 the scope of topics he's designated for.

11 Q. (BY MR. DOWDY): Are you familiar with the

12 Rapid Rack website Mr. Taylor?

13 A. No, not really.

14 Q. Have you reviewed the Rapid Rack website?

15 A. Not again in a long period of time.

16 Q. Do you know whether the Rhino Rack mark is

17 used anywhere on the Rapid Rack website?

18 A. Objection; beyond the scope of his topics.

19 A. No, I would have no personal knowledge.

20 Q. You're not designated as to topics 17

21 registrant's use of registrant's mark and advertising

22 including any such use, and some other things and

23 internet website January first 1999 to present.

24 Mr. Taylor, have you and been designated as to the

25 topic 17 in Exhibit 1?

1 A. Yes.
2 MR. ORME: Perhaps I misunderstood the
3 question. Can you please read back the question.
4 (Record read)
5 MR. ORME: Objection; withdrawn to that
6 question.
7 MR. DOWDY: And then I'm not we've got the
8 answer on the record. We can move forward.
9 MR. ORME: Sorry about that. I was just
10 trying to clarify that.
11 MR. DOWDY: No, no, I appreciate that very
12 much. I hope it didn't come off as sort of rude. I
13 just didn't want to be confused about what topics
14 you're contending he could testify to. On what
15 rather -- what topics he was being designated as to --
16 I realize we agree with respect to the import of that.
17 Q. (BY MR. DOWDY): Okay. I want to move back
18 to what we were talking about, the Rhino Rack Market
19 itself. Do you know how or why -- well, strike the
20 question.
21 Do you know why Rapid Rack chose the Rhino Rack
22 mark?
23 MR. ORME: Objection; outside the scope of
24 topics.
25 A. No, I have no personal knowledge of that.

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1 Q. (BY MR. DOWDY): Do you know how Rapid Rack
2 devised the Rhino Rack mark?

3 MR. ORME: Same objection.

4 A. Same response. I have no personal knowledge
5 of that.

6 Q. (BY MR. DOWDY): Do you know whether there
7 have been any studies done showing public recognition
8 of the mark?

9 MR. ORME: Objection.

10 MR. DOWDY: Of the Rhino Rack mark?

11 MR. ORME: Sorry Joe. It was actually
12 outside the scope.

13 A. No, I would have no personal knowledge of
14 that.

15 Q. (BY MR. DOWDY): Counsel how Rapid Rack
16 decides when it's going to use the Rhino Rack mark as
17 opposed to when it's going to use the Gorilla Rack
18 mark?

19 MR. ORME: Objection; beyond the scope of
20 topics.

21 A. No, no personal knowledge of that.

22 Q. Do you know whether consumers generally
23 associate the Rhino Rack mark with Rapid Rack?

24 MR. ORME: Objection; beyond the scope, call
25 for speculation.

1 A. I would have no personal knowledge of that.

2 Q. (BY MR. DOWDY): Do you know whether the
Page 63

3 Rhino Rack mark has acquired public acceptance and is
4 recognized by the public as being associated with
5 higher quality hardware product?

6 MR. ORME: Objection; compound, beyond the
7 scope, calls for speculation.

8 A. No, I have no personal knowledge of that.

9 Q. (BY MR. DOWDY): I may turn now to Madam
10 Court Reporter, if you would take out the envelope
11 that's marked interrogatory responses, if we could mark
12 that as an exhibit.

13 THE COURT REPORTER: That will be Exhibit 5.
14 (Exhibit No. 5.)

15 MR. DOWDY: Let's designate this exhibit also
16 needs to be sealed, Madam Court Reporter, and I presume
17 Mr. Orme is going ask to be AOE.

18 MR. ORME: AEO Attorneys eyes only.

19 MR. DOWDY: I never use the shorthand. I'm
20 not good at that.

21 Am I correct that is the designation you're
22 requesting Mr. Orme?

23 MR. ORME: Yes, with respect to those topics
24 that are so designated within the answers or responses
25 rather.

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1 MR. DOWDY: Absolutely. Is that the same
2 thing you were saying with respect to the documents?

3 MR. ORME: Yeah, that's correct.

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4 MR. DOWDY: Documents, okay. I understand.

5 MR. ORME: Just I want to designate attorneys
6 eyes only only the portion of the deposition that deals
7 with the documents that have been so designated under
8 the TTAB's rules as I believe with trade secret
9 commercially sensitive, I believe is their designation
10 for attorneys eyes only.

11 MR. DOWDY: Okay. I understand.

12 MR. ORME: I figured you did. I just wanted
13 to clarify. It's not encompassing everything.

14 MR. DOWDY: I might have blanked earlier. I
15 just wanted to make sure we were saying the same thing
16 with respect to the the exhibit concerning documents
17 and the exhibit concerning interrogatories.

18 MR. ORME: The designation is trade secret
19 commercially sensitive.

20 MR. DOWDY: Nonetheless, Madam Court Reporter
21 I would ask you be very careful with this document and
22 not disclose it generally to -- that you not disclose
23 this to members of the public, that we keep it sealed
24 and confidential.

25 Would you turn to page five, Mr. Taylor. Are you

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1 there, sir?

2 A. Yes.

3 Q. Interrogatory number three it says identify
4 the individuals who are most knowledgeable concerning
5 the use of registrants mark between 2000 and the

6 present and describe each such individuals involvement
7 with respect to registrants mark. Do you see that
8 question, sir?

9 A. Yes.

10 Q. Are you an individual who is knowledgeable
11 concerning registrants mark?

12 A. No.

13 Q. Indeed you're not listed in the answer; are
14 you?

15 MR. ORME: Objection. You mean on a personal
16 basis or you defined as Rapid Rack?

17 MR. DOWDY: Well, yeah, I understand. That's
18 a valid objection. With respect to the last question
19 only I'm asking you personally.

20 A. Personally no.

21 Q. In fact, you personally are not listed in the
22 responses as one with knowledge; is that correct?

23 A. Where is that?

24 MR. ORME: Ask him.

25 A. Where is that located.

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1 MR. DOWDY: I'm sorry. Page six there's some
2 objections and then it says individuals possessing
3 knowledge concerning mark US trademark registration
4 number include.

5 A. I saw these responses yesterday, but I've
6 never seen the questions, so.

7 Q. I understand that. And these are just the
8 responses. I'm asking if your name is listed among
9 those individuals possessing knowledge?

10 A. No.

11 Q. Turn to interrogatory number six on page
12 eight.

13 A. Okay.

14 Q. Actually -- strike that. Hold on for just a
15 second. I'm sorry. Actually what I wanted to look at
16 what interrogatory number 15, which begins on the
17 bottom of page 17. Are you there, sir?

18 A. Yes.

19 Q. If you will, I'll just read the
20 interrogatory. It says list all periodicals, trade
21 journals, radio and/or television advertisements and
22 Internet websites where registrant advertised in 2000
23 for each of the products identified in response to
24 interrogatory number 1.

25 Now, if you look, and then it says response

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1 interrogatory number 15, and the first paragraph is
2 objections and then it says Rapid Rack's investigation
3 is continuing and Rapid Rack will supplement this
4 response when and if some information becomes
5 available. Some information relative to this request
6 may have been destroyed during a flood at Rapid Rack
7 facility in 2005.

8 Do you know whether any information responsive to
Page 67

9 that request was actually destroyed in a flood in 2005?

10 A. The date on this document is incorrect. It
11 was 2004 as far as the flood date.

12 Q. So the flood was in 2004. Do you know
13 whether or not any information responsive to
14 interrogatory number 15 was destroyed in that flood in
15 2004? Was it actually destroyed?

16 A. I would have no personal knowledge on that.

17 Q. Interrogatory number 16 asks the same
18 question for 2001 -- actually let me back up to number
19 15 for just a second. It says Rapid Racks
20 investigation is continuing. Have you been involved in
21 looking for any materials involved in response to
22 interrogatory number 15?

23 MR. ORME: Objection; beyond the scope of his
24 designated topics. Go ahead.

25 A. Can you repeat that question, please?

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1 MR. DOWDY: Well, I can. I'll strike the
2 question and move on actually.

3 Interrogatory number 16 asks the same question,
4 but with respect to year 2001 list all periodicals,
5 trade journals, radio and/or television advertisements
6 and Internet website where registrant advertised in
7 2001 for each of the products identify in response to
8 interrogatory number 1. And the response to
9 interrogatory number 16, the first paragraph is some

10 objections and then it says, Rapid Racks investigation
11 is continuing and Rapid Rack will supplement this
12 response. Go up to page 19 when and if some
13 information becomes available some information relative
14 to this question may have been destroyed during a flood
15 at rapid racks facilities in 2005. I assume you're
16 going to testify again that the flood was in 2004?

17 A. Correct the flood was in 2004.

18 Q. Now, with respect to interrogatory number 16,
19 do you know whether any information actually responsive
20 to interrogatory number 16 was destroyed in that flood?

21 A. Not personally, no.

22 Q. Interrogatory number 17 asks the same thing
23 with respect to 2002 and if you notice if you look down
24 page 19 the same answer is given in the second
25 paragraph in response to number 17 and again with

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1 respect to all interrogatories. Can we agree that it
2 should say the flood was in 2004 that that would be
3 your testimony?

4 A. It was in 2004, yes.

5 Q. Do you know whether the 2004 flood actually
6 destroyed any information that would have been
7 responsive to interrogatory number 17?

8 MR. ORME: Go ahead and read interrogatory 17
9 and whenever he has a question on these take all the
10 time you need to review.

11 MR. DOWDY: Of course.
Page 69

12 A. I have no personal knowledge of that.

13 Q. If you will read interrogatory number 18, I'm
14 going to ask the same question about that.

15 A. I have no personal knowledge about that.

16 Q. If you'll review interrogatory number 19, I'm
17 going to ask you the same question about that?

18 MR. ORME: Please repeat the question.

19 MR. DOWDY: The question is whether he knows
20 if the 2004 flood actually destroyed any information
21 that would be responsive to the interrogatory.

22 MR. ORME: Thank you.

23 MR. DOWDY: You're welcome.

24 A. I have no personal knowledge.

25 Q. I'm going to ask you to review interrogatory

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1 number 20. I'm going to ask you the same question
2 namely whether the 2004 flood destroyed any information
3 that would actually be responsive to interrogatory
4 number 20.

5 A. I have no personal knowledge about that.

6 Q. All right. I will ask you to review
7 interrogatory number 21 and I'll ask you the same
8 question, namely whether the 2004 flood destroyed any
9 informing that actually would have been responsive to
10 that interrogatory.

11 A. We lost computers and PCs. That's the only
12 knowledge I have of that.

13 Q. Now, how could a flood in 2004 damage
14 information concerning year 2006?

15 A. Can you repeat that question please.

16 Q. Yeah, the flood was in 2004; correct?

17 A. Correct.

18 Q. The interrogatory number 21 concerns
19 advertising in 2006. How could the flood in 2004
20 damage information concerning 2006?

21 A. That was a mistake on my behalf.

22 Q. I will ask you with respect to interrogatory
23 number 22 that asks about advertising in 2007 that one
24 doesn't mention the flood that I see. I would ask
25 whether upon the investigation since these

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1 interrogatories were served Rapid Rack has found any
2 responsive information?

3 MR. ORME: Objection; outside the scope of
4 his testimony.

5 A. Not to my knowledge.

6 Q. (BY MR. DOWDY): Since the interrogatory
7 responses were served has Rapid Rack found responsive
8 information with respect to any of the interrogatories
9 we've just discussed, mainly interrogatory numbers 15,
10 through 22?

11 MR. ORME: Same objection.

12 A. I would have no knowledge of that.

13 MR. DOWDY: Give me one second. Mr. Taylor,
14 I believe you testified earlier, did you not, that you

15 saw product number GRL-100 and GRL-3012 in 2007, is
16 that correct, the packaging that's on the floor for
17 those products?

18 A. That is correct.

19 Q. You testified you saw the Rhino Rack mark on
20 those products?

21 A. That's correct.

22 Q. When was the first time in 2007 that you saw
23 the Rhino Rack mark on those products?

24 MR. ORME: Objection, unless you're asking on
25 a personal basis.

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1 MR. DOWDY: I'm asking on behalf of the
2 company, but I understand we disagree about what the
3 answer's gonna be -- rather what the answer's gonna
4 mean.

5 A. I'm not really sure of the time frame on that
6 personally.

7 Q. Well, do you have any idea whether it was the
8 first half of the year or the second half of the year?

9 MR. ORME: Same objection.

10 A. No, I do not.

11 Q. (BY MR. DOWDY): Is it possible that the
12 Rhino Rack mark first appeared on GRL-100 and GRL-3012
13 for the first time in late 2007?

14 MR. ORME: Objection; calls for speculation.

15 A. I have no personal knowledge on that.

16 Q. (BY MR. DOWDY): So you just don't know?

17 MR. ORME: Objection to the extent you're
18 calling for personal knowledge.

19 A. Correct, I personally do not know.

20 Q. (BY MR. DOWDY): Do you know whether prior to
21 2007 any product with the GRL prefix had the Rhino Rack
22 mark on it?

23 A. No, I do not personally know that.

24 MR. DOWDY: Madam Court Reporter, will you
25 open and mark responses to request for admissions as

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1 the next exhibit.

2 THE COURT REPORTER: That will be Exhibit 6.
3 (Exhibit No. 6 marked.)

4 Q. (BY MR. DOWDY) Mr. Taylor let me ask you:
5 Do you know what resources Rapid Racks customers use to
6 find information about Rapid Racks products?

7 MR. ORME: Objection; vague, calls for
8 speculation.

9 A. Could you define which product?

10 MR. DOWDY: Any products at all.

11 MR. ORME: Same objection.

12 A. No, I do not.

13 Q. (BY MR. DOWDY): Do you know if they use
14 anything other than the Internet?

15 MR. ORME: Same objection.

16 A. No, I do not.

17 Q. (BY MR. DOWDY): If you can turn to request
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18 for admission number three on page two. This is
19 Exhibit No. 6; correct?

20 MR. ORME: Yes, it's Exhibit 6.

21 Q. (BY MR. DOWDY): Are you there, sir?

22 A. Yes, I'm on page three.

23 Q. Request for admission number three says
24 registrant cannot produce and documentary or
25 demonstrative in evidence or proof of registrant's mark

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1 in calendar year 2000; do you see that?

2 MR. ORME: You just said request for
3 admission number three on page three.

4 MR. DOWDY: On page two.

5 MR. ORME: I'm sorry. I believe you referred
6 to it as number three. Go ahead again.

7 MR. DOWDY: I'm looking for request for
8 admission number three on page two it says registrant
9 cannot produce any documentary or demonstrative
10 evidence or proof of use of registrant's mark in
11 calendar year 2000.

12 MR. ORME: Objection; outside the scope of
13 his designated testimony.

14 MR. DOWDY: Okay. You see that in response
15 to request for admission number three there's an
16 objection. Then the second sentence says not
17 withstanding the above objections and without waiver
18 there of registrant denies this request. Do you see

19 that sir?

20 A. No I do not.

21 Q. I'm looking understand response to request
22 for admission number three.

23 A. Hold on.

24 Q. I'm looking at the second sentence.

25 A. Yes, I do.

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1 Q. What documentary or demonstrative evidence or
2 proof of use does Rapid Rack have of use of
3 registrant's mark in calendar year 2000?

4 A. I have no personal knowledge of that.

5 Q. Now, I'm on page three Patrick and I'm
6 looking for request for admission number eight?

7 A. Excuse me. Maybe I misunderstood the
8 question. Could you repeat the last question please.

9 MR. DOWDY: Could you read the question back,
10 madam court reporter?

11 (Record read)

12 Q. (BY MR. DOWDY): I said what documentary or
13 demonstrative evidence or proof of use of registrant's
14 mark does Rapid Rack have for calendar year 2000?

15 A. The only thing I'm aware of are the screen
16 prints I did off the come computer system last night
17 for the RR-4805s.

18 Q. That's all you're aware of?

19 A. That's all I am actually aware of. That I'm
20 personally aware of at this time.

21 MR. DOWDY: Patrick are those what were
22 produced to us last night at approximately 10 o'clock
23 our time. I'm sorry are these what was produced to us
24 actually during this deposition I got an e-mail from
25 Stacy, and I forgot her last name. Is that what you're

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1 talking about?

2 MR. ORME: That's correct. I believe that's
3 what he's talking about you'd have to ask him
4 specifically as to what you're looking at and then I
5 have copies of what was sent to you this morning.

6 MR. DOWDY: Okay. Do you have copies in
7 there?

8 MR. ORME: Yes, I do.

9 MR. DOWDY: Could we put that in front of the
10 witness and mark them.

11 MR. ORME: Yeah, that's fine.

12 (Exhibit No. 7 marked.)

13 MR. DOWDY: Have they been marked and they're
14 in front of the witness?

15 THE COURT REPORTER: Yes.

16 A. Do you have exhibit number 7 in front of you
17 Mr. Taylor.

18 A. Yes, I do.

19 Q. Is this what you were just testifying to?

20 A. Yes.

21 Q. This is. Now with respect to request for

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22 admission number eight on page -- begins on the very
23 bottom of page three. Registrant cannot produce any
24 documentary or demonstrative evidence or proof of use
25 of registrant mark in 2001. You see that, sir?

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1 A. Yes, I do.

2 Q. You see understand response to request for
3 admission number eight, if you look at the second
4 sentence very last bit there it says registrant denies
5 the request do you see that, sir?

6 A. Yes I do.

7 Q. What documentary or demonstrative evidence or
8 proof of use of registrant's mark does Rapid Rack have
9 for calendar year 2001?

10 MR. ORME: Objection; responses to request
11 for admissions are outside the scope of his designated
12 topics.

13 MR. DOWDY: You can answer the question.

14 A. The only personal knowledge I have are the
15 screen prints that I printed out last night for the
16 RR-4805.

17 MR. DOWDY: That's the exhibit seven we
18 looked at a moment ago.

19 A. That is correct.

20 Q. If you'll look with me for request for
21 admission number 13 and it says registrant's cannot
22 produce any documentary or demonstrative evidence or
23 proof of use of registrant's mark in calendar year

24 2002. Do you see that, sir?

25 A. Yes, I do.

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1 Q. And you see in response to request for
2 admission number 13 at the very end it says
3 registrant's denies this request?

4 A. Yes I do.

5 Q. What documentary or demonstrative evidence or
6 proof of use of registrant's mark does Rapid Rack have
7 for calendar year 2002?

8 MR. ORME: Objection; outside the scope.

9 A. Again, the printout that I personally made
10 last night for the RR-4805s.

11 Q. Is that the same answer you would give sir
12 with respect to years 2003 through 2006?

13 A. No, it is not.

14 MR. ORME: Objection; vague there were
15 multiple questions in this.

16 Q. (BY MR. DOWDY): Turn to question for
17 admission 18, Please?

18 A. And as on page seven it says registrant
19 cannot produce any documentary or demonstrative
20 evidence or proof of use of registrant's mark for
21 calendar year 2003. Do you see that, sir.

22 MR. ORME: I'm sorry. I didn't hear you
23 actually cut out a little there.

24 MR. ORME: Go ahead. Would you repeat that,

25 Randy Taylor.txt
please Jeff.

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1 MR. DOWDY: I read request for admission
2 number 18.

3 MR. ORME: Gotcha.

4 MR. DOWDY: Do you see request for admission
5 number 18 Mr. Taylor.

6 A. Yes I do.

7 Q. Do you see where registrant has denied that
8 question?

9 A. Yes I do.

10 Q. What documentary or demonstrative evidence or
11 proof of use of registrant's mark does Rapid Rack have
12 for calendar year 2003?

13 MR. ORME: Objection outside the scope.

14 A. The printout that I printed last night for
15 the RR-4805.

16 Q. That's exhibit number seven we've discussed?

17 A. That is correct.

18 Q. If you'll turn to page eight a request for
19 admission number 23 asks the same thing about calendar
20 year 2004. Do you see that registrant has denied that
21 request. Yes I do?

22 Q. What documentary or demonstrative evidence or
23 proof of use of registrant mark does Rapid Rack have
24 for calendar year 2004?

25 MR. ORME: Objection; outside scope of

1 designated testimony.

2 A. I have no personal knowledge of that.

3 Q. So there's nothing you're aware of, sir?

4 MR. ORME: Objection same objection.

5 A. Not personally.

6 Q. (BY MR. DOWDY): With respect -- I'm looking
7 now at request for admission number 28 on page ten that
8 concerns the same thing for calendar year 2005. You
9 see that registrant has denied that request?

10 A. Yes I do.

11 Q. What documentary or demonstrative evidence or
12 proof of use of registrant's mark does Rapid Rack have
13 for calendar year 2005?

14 MR. ORME: Same objections.

15 A. I have no personal knowledge of that.

16 Q. You're not aware of anything?

17 A. Personally know I am not.

18 Q. Let's look at request for admission number 33
19 That asks for an admission as to year 2006 of the same
20 scope we've just discussed and you see that registrant
21 has denied that request also?

22 MR. ORME: Same objection.

23 A. Yes I do, I see it.

24 Q. What documentary or demonstrative evidence or
25 proof of use of registrant mark does Rapid Rack have

1 for calendar year 2006?
2 MR. ORME: Same objection.
3 A. I have no personal knowledge of that.
4 Q. You're not aware of anything?
5 A. Personally know.
6 Q. Let me ask you this: what documentary or
7 demonstrative evidence or proof of use of registrant's
8 mark does Rapid Rack have for calendar year 2007.
9 MR. ORME: Objection beyond the scope.
10 Q. You can answer?
11 A. I have no personal knowledge of that.
12 Q. (BY MR. DOWDY): You're not aware of
13 anything?
14 A. No I am not personally aware of it.
15 MR. DOWDY: Can you give me -- like can we
16 take a quick 60 seconds stretch break and go off the
17 record for 60, 120 seconds something like that.
18 MR. ORME: Sure. Off the record.
19 (Off the record.)
20 Q. (BY MR. DOWDY): Mr. Taylor, I want to thank
21 you for appearing today on behalf of Rapid Rack and
22 that conclude or 30(b)6 deposition of Rapid Rack
23 Industries. That's all the questions I have.
24 A. All right thank you very much.
25 MR. DOWDY: Stipulate the rules of the TTAB

1 apply unless there's a general objection, the objection
2 for anything except form is preserved.

3 MR. DOWDY: He can waive or sign it.

4 MR. ORME: It's not going to be waived. We
5 request to review the transcript and make corrections
6 as necessary. We would also note for the record the
7 standard be TTAB protective order requires a
8 nondisclosure agreement which has not been signed by
9 the court reporter as was the duty of opposing counsel
10 today. I would trust you're going to take care of that
11 Joe.

12 MR. DOWDY: I will take care of that ma'am
13 please, we'll be sending a standard protective order
14 and an agreement that you wouldn't disclose. In the
15 meantime would you kindly confirm that you won't share
16 any of the exhibits or any of the deposition
17 transcripts with anyone in this litigation?

18 THE COURT REPORTER: Yes. I will not.

19 MR. DOWDY: My understanding is the original
20 transcript comes to us and there's an errata. You get
21 a copy and then you have an errata statement. You have
22 an errata and it comes to us.

23 MR. ORME: In California that's not how it
24 goes. The original goes to the folks who actually have
25 their deposition taken we review that and then forward

Randy Taylor.txt

1 the original an errata sheet.

2 MR. DOWDY: How long does that take.

3 MR. ORME: I believe we have 30 days, so I

4 think from 30 days from the time we actually receive

5 the transcript and to provide An errata sheet and the

6 original.

7 MR. DOWDY: Well, let's madam court reporter,

8 can we get back with you on that? I suppose I'd like

9 to a talk to counsel off line about that and sort of

10 which rules apply. I don't want to accidentally anger

11 the TTAB and fail to follow their rules. We could talk

12 off line.

13 THE COURT REPORTER: In California the Code

14 is the witness has to come to the reporter's office to

15 sign the transcript, but the parties can stipulate to

16 send the original to the witness for signature.

17 MR. ORME: For the record the deposition is

18 occurring in California and we're operating under the

19 rules of the central district of California. I would

20 like to reach a stipulation. Why don't we take a 15

21 minute break, Joe, while you review the rules.

22 MR. DOWDY: That's okay. We don't stipulate.

23 We want him to come to her office. I want him to come

24 review the deposition in your office

25 MR. ORME: We're going to go off the record

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1 for a few minutes. We'll be right back.

2 (Off the record.)
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3 MR. DOWDY: LET me apologize. I
4 misunderstood something the court reporter said. We'll
5 stipulate to -- we'll make a standard stipulation of
6 central district.
7 MR. ORME: The original will come to us
8 we'll -- the witness will review provide An errata
9 sheet and then we will forward the original to you
10 MR. DOWDY: Right right right we stipulate
11 that the errata sheet should be made within 30 days
12 other than that we do stipulate. I assume we stipulate
13 to that as well.
14 MR. ORME: 30 days.
15 MR. DOWDY: Yeah.
16 MR. ORME: Yes, we stipulate to 30 days to
17 reply with the errata sheet.
18 MR. DOWDY: We're off the record.
19 MR. ORME: The court reporter is taking the
20 exhibits, correct? Her copy of the exhibits?
21 MR. DOWDY: Yes.
22 MR. ORME: I just want to be clear on that.
23 Thank you.
24
25

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[REDACTED]

Exh. # I
to Rule 30(b)(6)
Deposition

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EXHIBIT 5

Nancy Childers

From: Joe Dowdy
Sent: Wednesday, September 17, 2008 11:18 AM
To: Patrick J. Orme
Cc: Reed Hollander; David Harlow; David Dillard
Subject: RE: Protective Order Violations

Dear Patrick:

Thank you for bringing this issue to my attention. I have contacted the Board and asked that the filing be sealed and removed from public access. It should be down once the TTAB server reboots later today. Pursuant to the Board's instructions, I will file a redacted version of the Motions, which will relate back to the original filings, such that the response deadline will remain the same. The filing of the original Motions not under seal was an oversight on my part, which we are correcting immediately upon receipt of your email.

Please note also that, after receiving your e-mail, I reviewed your client's interrogatory responses again, and it is plainly apparent that the classifications at issue should not have been made in the first place. The responses marked as "confidential," namely, Nos. 6-13, do not contain any information that is properly classified as confidential. These interrogatory responses contain only the names of the retailers at which Rapid Rack contends that it has offered its goods for sale to the public. The consuming public necessarily would have to be aware that Rapid Rack was offering its goods at these retailers for Rapid Rack to be able to claim any trademark rights at all. At the very least, it would seem that your client would need for the public to know where its products can be purchased to stay in business. That being so, there is no justification for the responses being designated "confidential."

The responses marked as "Trade Secret/Commercially Sensitive," namely, Nos. 4, 14, and 27, do not contain any substantive information. Indeed, the responses contain no independently responsive information at all. Rather, they state only that Rhino Linings must attempt to derive the answers sought from allegedly responsive documents. The allegedly responsive documents have not been filed with the Board or otherwise disclosed. Based on the way the putative responses were drafted, we concluded that the affected interrogatories were only being designated as "Trade Secret/Commercially Sensitive" to the extent the referenced documents were being incorporated as part of the answer. The language of the purported responses to Interrogatories Nos. 4, 14, and 27 plainly are not trade secrets or commercially sensitive on their face, as they provide no actual company data or information.

I trust that our course of action, taken within a week of the Board posting the filing and immediately upon receipt of your e-mail, will assuage your client's concerns (without regard to whether we agree that the concerns are well founded). However, we reserve the right to make a motion to void the erroneous designations if your client puts them at issue in a separate filing.

Regards,

Joe

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9/17/2008

From: Patrick J. Orme [mailto:PJO@cph.com]
Sent: Tuesday, September 16, 2008 10:11 PM
To: Joe Dowdy
Cc: Reed Hollander; David Harlow; David Dillard
Subject: Protective Order Violations

Dear Joe,

I am quite concerned regarding the violations of the Protective Order contained in your motion to compel. As I am sure you are aware, you wrote on June 24, 2008 "I agree that the 'Trade Secret/Commercially Sensitive' designation will afford attorneys-eyes-only classification to information so designated and that the 'Confidential' designation shall be the standard designation for information which is not for public disclosure." Additionally, 37 C.F.R. 2.116(g) applies a Standard Protective Order to all cases filed before the TTAB on or after August 31, 2007.

All discovery responses designated "Trade Secret/Commercially Sensitive" or "Confidential" are required to be submitted under seal pursuant to 37 C.F.R. 2.27 and TBMP 412.04. Rhino Linings disclosed such designated information in its motion to compel by failing to file Exhibit 1, Rapid Rack's Interrogatory Responses, under seal. There are at least nine different disclosures in Exhibit 1 that violate the Protective Order by your failure to file under seal.

If you immediately withdraw the motion to compel, Rapid Rack may not be forced to move for sanctions pursuant to 37 C.F.R. 2.125(e), 37 C.F.R. 2.120(g) and Federal Rule of Civil Procedure 37(b)(2), including dismissal of the entire cancellation proceeding.

Regards,
Patrick

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9/17/2008